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ABSTRACT

Representative William J. Hughes introduced a hearing to examine the Satellite Home Viewer Act of 1988 and issues arising from it. Discussion was presented on a recent Federal Communications Commission report on price discrimination, the definition of network, and the effectiveness of the "white area" amendment that permits the transmission of network signals to areas of the country, often rural, that do not receive signals through the air. Whether wireless cable falls outside the definition of cable television for purposes of the cable compulsory license was discussed, as was the concept of retransmission consent and its relationship to copyright. Testimony was received from the following witnesses: (1) Preston R. Padden, of Fox Broadcasting Company; (2) Andrew R. Paul, of the Satellite Broadcasting and Communications Association of America; (3) Bob Phillips, of the National Rural Telecommunications Cooperative; (4) Robert L. Schmidt, of the Wireless Cable Association; (5) Dorothy Schrader, Associate Register of Copyrights for Legal Affairs; and (6) Jeffrey C. Treeman, of United Video. Letters and statements submitted for the hearing are included, and an appendix contains additional letters pertaining to the hearing. (SLD)

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COPYRIGHT AND TELECOMMUNICATIONS

ED358832

HEARING

BEFORE THE

SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

JULY 10, 1991

Serial No. 95

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COPYRIGHT AND TELECOMMUNICATIONS

WEDNESDAY, JULY 10, 1991

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:03 a.m., in room 2237, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives William J. Hughes, Mike Synar, Patricia Schroeder, Rick Boucher, Carlos J. Moorhead, and Hamilton Fish, Jr.

Also present: Hayden W. Gregory, counsel; Michael J. Remington, assistant counsel; Phyllis Henderson, staff assistant; and Thomas E. Mooney, minority counsel.

OPENING STATEMENT OF CHAIRMAN HUGHES

Mr. HUGHES. The Subcommittee on Intellectual Property and Judicial Administration will come to order.

Good morning. The Chair has received a request to cover this hearing in whole or in part by television broadcast, radio broadcast, still photography, or by any of such methods of coverage. In accordance with committee rule 5(a), permission will be granted unless there is objection. Is there objection?

[No response.]

Mr. HUGHES. Hearing none, the permission is granted.

Rapid scientific advances in electronics technology occurring in a changing environment of Federal court decisions, Copyright Office rules, and Federal Communications Commission policy have affected the way American households receive television programming.

It was only a little more than four decades ago that the science fiction writer Arthur C. Clarke set forth the blueprint for the modern system of transmitting television signals by satellite. It did not take long for Clarke's theories to become reality. In 1962, an 8-minute experimental broadcast was sent from the United States to France and England via Telestar I. The first American home earth station was constructed in 1976, the same year that the Congress passed the landmark Copyright Revision Act.

Very little attention was paid in that act to copyright issues posed by satellite transmissions directly to individuals for private home viewing. Congress did bring cable television into the copyright system by establishing a compulsory license.

Several years ago, in order to avoid a potential collision between copyright and telecommunications law, the subcommittee held similar oversight hearings on copyright and new communications technologies. Two issues were of pressing importance: the first related to the delivery of satellite communications directly to home viewers and the second to low power television. Both were later resolved by legislative enactments.

The hearing today will examine the first of those enactments, the Satellite Home Viewer Act of 1988, and issues that it has spawned. We will hear discussion about a recent FCC report on price discrimination, standing to bring lawsuits against price discrimination, the definition of "network," and the effectiveness of the "white area" amendment which permitted the retransmission of network signals to areas of the country, often rural, that do not receive over-the-air signals.

The hearing will also stimulate debate about wireless cable and whether, as the Copyright Office found just this week, this microwave delivery system falls outside the definition of "cable television system" for purposes of the cable compulsory license. Finally, the concept of retransmission consent and its relationship to copyright will be discussed.

In my opinion, this Nation's copyright law is working fairly well. Copyright industries in the United States account for nearly 6 percent of the GNP and are now larger than the U.S. agricultural, forestry, and fishing industries. During the oversight hearings on intellectual property and trade, the subcommittee learned that U.S. copyright law serves as a model for the rest of the world. However, experience has shown that Congress cannot rest on its laurels and merely contemplate as "couch potatoes" the passing technological and legal screen. Vigorous oversight must be exercised, and where serious problems arise, the jurisdiction and experience of the committee must be invoked in order to resolve those particular problems.

It promises to be an interesting hearing, the first of perhaps other hearings, and I look forward to the testimony.

The gentleman from California.

Mr. MOORHEAD. Well, thank you, Mr. Chairman.

In 1988 we had to revisit the 1976 Copyright Act because of a problem that developed with the satellite carriers and the dish owners. The court had ruled that since the satellite carrier did nothing more than transmit a signal, they were passive and did not have to pay a copyright fee. However, if a satellite carrier was to retain this copyright exemption, it would not be able to scramble or unscramble signals, nor could they negotiate package deals with the dish owners. The Satellite Home Viewer Act took care of these problems, and I understand that it's working pretty well.

These hearings will also point out two other issues that are important to this subcommittee. One is retransmission consent, which is being worked on in the Senate and the House Commerce Committees. I agree with the Associate Register of Copyright's comment in her excellent statement on page 17 that, "Retransmission consent has as much to do with copyright as it did with communications policy."

And the other issue which we must be concerned with is the Copyright Office's proposed rulemaking concerning the definition of a cable system. If the Copyright Office were to eventually adopt this proposed rule, it would clearly have a devastating effect on the wireless cable industry. I'm not sure we could move quickly enough to ward off the effect. In any case, I'm not sure I agree with that proposed rule, and I'm looking forward to this morning's hearing.

Thank you, Mr. Chairman.

Mr. HUGHES. I thank the gentleman.

Does the gentleman from Virginia have an opening statement at all?

Mr. BOUCHER. No statement.

Mr. HUGHES. Our leadoff witness this morning is Ms. Dorothy Schrader, General Counsel of the Copyright Office and Associate Register of Copyrights for Legal Affairs. I understand that the Register of Copyrights, Ralph Oman, is in Saudia Arabia on a mission of copyright goodwill.

Ms. Schrader is no stranger to the subcommittee. She has held various positions at the Copyright Office since 1963. Over the years, Ms. Schrader has ably assisted the Congress and the courts in the identification of many serious copyright issues as well as in the legislative solution to those particular problems. She has an undergraduate degree from the University of Southern California and a law degree from Harvard University.

Ms. Schrader, we have read your excellent written statement, as my colleague from California has indicated. We hope that you can summarize, but you may proceed as you see fit. I wonder if you would introduce your colleagues first. Welcome.

STATEMENT OF DOROTHY SCHRADER, ASSOCIATE REGISTER OF COPYRIGHTS FOR LEGAL AFFAIRS, ACCOMPANIED BY WILLIAM J. ROBERTS, JR., SENIOR ATTORNEY ADVISER, AND PATRICIA L. SINN, ATTORNEY ADVISER

Ms. SCHRADER. Yes. Thank you, Mr. Chairman and members of the subcommittee. I am Dorothy Schrader, Associate Register of Copyrights for Legal Affairs. I'm accompanied this morning by two attorneys from the Office of General Counsel, my staff. On my right is William Roberts, a Senior Attorney Adviser; on my left, Patricia Sinn, Attorney Adviser.

I welcome this opportunity to appear before you at this oversight hearing on copyright and telecommunications policy issues. I believe my full statement will be accepted for the record and I'll try to summarize.

Mr. HUGHES. Without objection, it will be so ordered.

Ms. SCHRADER. I'll briefly review developments under the Satellite Home Viewer Act, report on our administrative experience under that act, and then comment on retransmission consent and other policy issues under the cable compulsory license.

Mr. Chairman, Congress passed the Satellite Home Viewer Act to balance the interests of copyright owners with the interests of program distributors and home dish owners. Copyright owners under this act receive compensation for the public performance of their works by satellite carriers. Home dish owners get satellite programming, and at least as far as the license is concerned, for

a reasonable price. Satellite carriers pay royalties for the use of the programming.

This act established a statutory license for 4 years, which is now soon to end, and it will be followed by a 2-year voluntary license for arbitrated license fees. Payments under the Government-set license have come to about $5.5 million in the 2 years the act has been in effect. Of course, reports are incomplete for 1991.

The statutory license has functioned very well, we think, and has presented few administrative policy issues. One unresolved issue is whether Public Broadcasting Service stations are superstations or network stations under the act. That, of course, affects the royalty rate, because the royalty is 12 cents for each superstation signal and 3 cents for network signals. The Copyright Office is accepting statements of account from satellite carriers that use either rate, pending clarification through legislation.

With respect to another policy issue, the Copyright Royalty Tribunal, which has the responsibility for distributing the royalties that we collect in the Copyright Office, determined that network program owners are entitled to share in the satellite carrier royalty fund to the extent that they are owners of copyright. The question had arisen because of the fact that in the case of cable the royalties are primarily for nonnetwork programming, so the networks per se don't share in the royalties under the cable compulsory license.

I understand that you will hear from another witness about the policy issue of unlawful price discrimination. I don't have very much to say about that except to note that section 119(a)(6), a provision of the Satellite Carrier Act, makes the willful or repeated secondary transmission of copyrighted programming actionable as an act of infringement if the satellite carrier unlawfully discriminates against a distributor. However, standing to sue is governed by the general infringement provision of section 501(a) and only copyright owners may sue. There isn't any special authority for distributors to sue. So far, copyright owners have elected not to sue for discrimination regarding price, if there is such unlawful discrimination.

The FCC, of course, has issued a report finding that there is price discrimination, but they still have under consideration whether there's any justification for this in terms of marketing and provision of services. The matter remains pending before the FCC.

I turn now to a brief discussion of two major cable compulsory license policy issues: retransmission consent and definition of a cable system, as you identified in your statement, Mr. Chairman.

Several pending bills in the House and the Senate would legislate regarding mandatory carriage of broadcast signals by cable systems. These are the so-called "must carry" requirements. In the House, H.R. 2403 amends the Copyright Act. It amends section 111 of the Copyright Act in this respect. Another bill, H.R. 1303, deals with "must carry" under the Communications Act, but it also contains provisions dealing with copyright royalty payment for distant signals. Only the Senate bill raises the policy issue of retransmission consent directly; that is, it's only the Senate bill, as amended by the subcommittee in the Senate, that has a retransmission consent provision. Presumably, this issue will be before the communications committees in the House as well.

In the Senate bill, the provision is that 1 year after enactment no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station without the express authority of the originating station. So cable operators wishing to carry any broadcast signal, whether local or distant, would have to obtain the permission of the broadcaster to do so.

Now it is true that the broadcaster has an option. The broadcaster can decide to opt for the "must carry" provisions that are also in the bill, but it's the broadcaster that has the power to decide and ultimately could apparently withhold consent under the retransmission consent provision.

This concept of retransmission consent is, of course, not new to communications policy. It had its beginnings in the early days of radio broadcasting, and it is, in fact, a right vis-a-vis another broadcasting entity. You must get retransmission consent.

But, the FCC decided early on in its regulation of cable that the relevant section 325 of the Communications Act does not require cable operators to obtain consent for their retransmission of broadcast signals. In my written statement I recall the past history of FCC consideration of retransmission consent as a possible device for cable regulation, but in these oral remarks I'll just discuss the policy issue.

In the view of the Copyright Office, retransmission consent effectively permits broadcasters to stop the operation of the cable compulsory license through withholding consent of retransmission to a cable operator. Of course, cable operators may in many circumstances be given consent and pay additional copyright fees, a retransmission fee. Some of these additional moneys presumably would flow to copyright owners and programmers, and that may or may not be good copyright policy. But, the point is that it is a departure from the policy that now exists in the Copyright Act in the form of a cable compulsory license.

In addition, while retransmission consent will be required for cable systems under the pending Senate bill, it will not be required immediately for satellite carriers until the expiration of the satellite carrier compulsory license, the section 119 license. In our view, this creates a potential conflict with congressional reconsideration of the satellite carrier license in 1995.

Then the last issue I'll discuss: who or what are cable systems under the Copyright Act? This might seem to be self-evident, but it really isn't. It is a major administrative policy issue.

The Copyright Office today is releasing through the Federal Register, for publication tomorrow, a set of proposed rules regarding the eligibility of so-called, SMATV (Satellite Master Antenna Television systems) or private cable, as it is sometimes called, MMDS (Multichannel Multipoint Distribution Services) sometimes called wireless cable, and satellite carriers, for the cable compulsory license.

Congress, of course, as we have said and you've noted, already created a separate statutory license for satellite carriers, so the Office finds that a satellite carrier is not a cable system. This portion of the rulemaking relates to an issue that really was pending before you passed the satellite carrier license in 1988.

The Office also proposes, as a preliminary finding, and I do stress that it's preliminary, that satellite master antenna facilities are cable systems within the meaning of the Copyright Act, but Multichannel Multipoint Distribution Systems are not cable systems. These preliminary conclusions are based on a literal interpretation of the Copyright Act against the regulatory background of SMATV's and MMDS systems by the FCC, especially in 1976, but also since that time.

To the extent I have time, Mr. Chairman, I'll explain briefly. MMDS facilities to us appear not to be cable systems for two main reasons. First, they do not primarily distribute their service by wires and cables. They, in fact, use microwave as the primary method of transmission.

We at this point find no evidence that Congress envisioned in 1976 a cable system which would operate without wires as the predominant mechanism for distributing programming services to subscribers. Under our present interpretation, the phrase "other communications channels" is not intended to mean systems that use retransmission means other than cables and wires, but only those that use microwave in addition to cables and wires. That's really a question of whether there's a predominant use of cables and wires.

Why is this important? It's important because this was the regulatory background that existed in 1976. It was the FCC definition of cable system at that time which Congress essentially adopted in the Copyright Act. The Copyright Act certainly has its own definition of cable system. I'm not suggesting that the Copyright Act definition is exactly the same as the definition in the Communications Act, which was amended later than the Copyright Act. The Communications Act was amended in 1984.

But, the fact is that the FCC has never regulated an MMDS as a cable system. In fact, MMDS did not exist until 1983. Given the interplay of the compulsory license with communications policy and Congress' decision to condition the cable compulsory license on the rules and regulations of the FCC, we preliminarily conclude that MMDS's are not cable systems. However, since this is a preliminary finding, I stress that we will continue our existing practice of accepting statements of account and royalty payments from MMDS operators if they wish to file.

Although we conclude that SMATV's may qualify as cable systems because the FCC has at least something of a tradition of regulating some SMATV facilities as cable systems, that preliminary decision presents enormous administrative problems. It's very difficult to fit SMATV systems into the provisions of the cable compulsory license. I'll just mention some of the problems.

The definition of gross receipts does not really easily apply to SMATV operations because they deal with cases where there are indirect fees. The typical cable system has a subscriber who pays a monthly fee. The typical SMATV may be in a condominium or a cooperative, and the fee may be buried in the rental or the condominium fee. It's very difficult to figure out gross receipts.

The identification of who are the subscribers to the SMATV service is enormously difficult, and even who is the operator of the service is difficult to determine. And, finally, applying the FCC's

former cable carriage rules will be very difficult since most of the SMATV's were exempt from cable carriage rules.

So, under these circumstances, the Office would most certainly welcome congressional guidance or intervention in the form of legislation to solve these very difficult interpretative policy issues regarding the applicability of the cable compulsory license in the case of both SMATV and MMDS facilities.

Thank you for your time and patience. I'll be pleased to respond to your questions.

Mr. HUGHES. Thank you, Ms. Schrader.

[The prepared statement of Ms. Schrader follows:]

SUMMARY
STATEMENT OF DOROTHY SCHRADER
ASSOCIATE REGISTER OF COPYRIGHTS FOR LEGAL AFFAIRS
JULY 10, 1991

The Satellite Home Viewer Act of 1988 provided for a temporary statutory license for four years to retransmit superstation and network programming to home dishowners for private viewing, followed by a two-year voluntarily negotiated or arbitrated license. The Act sunsets at the end of 1994. The statutory license phase has functioned well and has presented few administrative policy issues. The Copyright Royalty Tribunal resolved one issue: networks have a right to share in the royalty pool to the extent they are copyright owners. One unresolved interpretive policy issue is the appropriate royalty rate for retransmission of Public Broadcasting Service stations. Are they superstations (12 cent royalty) or network stations (3 cent royalty)?

The Federal Communications Commission reports that price discrimination exists but has not made specific findings yet as to whether the discrimination is unlawful in a particular case. The Satellite Home Viewer Act gives a private right of action if a satellite carrier unlawfully discriminates against a distributor, but only the copyright owner has standing to sue. No suits have been filed by copyright owners.

Policy issues continue to arise regarding the cable compulsory license of the Copyright Act (section 111). Several pending bills (H.R. 1303; H.R. 2403; and S.12) would, in different ways, establish statutory "must carry" provisions, mandating the carriage of certain broadcast signals by cable systems.

Retransmission consent has returned as a policy issue, since S.12, as amended by the Senate Subcommittee on Communications, would give broadcasters a right of retransmission consent, except for the stations covered by the Satellite Home Viewer license. A broadcaster may grant or withhold consent for cable retransmission, or alternatively require cable carriage, if the signal qualifies as a must carry signal. The power to withhold consent makes retransmission consent the equivalent of copyright exclusivity and creates a conflict with the cable compulsory license of section 111 of the Copyright Act.

The Copyright Office today issues proposed rules to deal with major administrative policy issues regarding eligibility of satellite master antenna television (SMATV), multichannel multipoint distribution services (MMDS), and satellite carriers for the cable compulsory license. The Office finds that satellite carriers are not cable systems, and makes preliminary findings that SMATV's may qualify as cable systems, but MMDS facilities do not qualify as cable systems. Pending final rules, the Office will continue to accept Statements of Account and royalties from MMDS facilities. The Congress may wish to consider legislation either to clarify the definition of a cable system for copyright purposes, or, if appropriate, to establish a separate statutory license, perhaps similar to the Satellite Home Viewer Act license.

STATEMENT OF DOROTHY SCHRADER
ASSOCIATE REGISTER OF COPYRIGHTS FOR LEGAL AFFAIRS

BEFORE THE SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION
HOUSE COMMITTEE ON THE JUDICIARY
102nd CONGRESS, FIRST SESSION

July 10, 1991

Mr. Chairman and members of the Subcommittee, I am Dorothy Schrader, Associate Register of Copyrights for Legal Affairs. I welcome this opportunity to appear before you at this oversight hearing on copyright and telecommunications policy issues. I will review developments under the Satellite Home Viewer Act of 1988 [1] and report on our administrative experience. In addition, I will comment on "retransmission consent" and other policy issues under the cable compulsory license.

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1 Pub. L. No. 100-667, 102 Stat. 3949 (1988).

I. SATELLITE HOME VIEWER ACT OF 1988

A. Background.

As you know, advances in satellite technology and changes in Federal Communications Commission (FCC) regulatory policy have had a striking impact in recent years on the way the American public receives television programming. Viewers still receive traditional network programming over the air, captured by home antenna. They also receive television "superstations"[2] and other cable programming via satellite resale carrier and cable television systems. The technological development of the home earth station fostered the emergence of another programming audience: home dishowners whose backyard dishes intercept satellite-delivered signals.

Home dishowners initially picked programming off satellites for free. In 1984, Congress passed the Cable Act, [3] which provided that home dishowners could continue to intercept satellite signals unless proprietors either scrambled their signals or established a marketing plan for home dishowner subscribers. Many copyright holders and resale satellite carriers decided to scramble their signals. Satellite carriers, once they started scrambling the signals they delivered, and sold descrambling devices to home dishowners, arguably lost their exempt status under section 111(a)(3) of the Copyright Act and incurred liability for infringement. The Copyright Office, in response to public and Congressional inquiry, determined that indeed, this

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[2] The term "superstation" refers to independent, commercial and noncommercial stations secondarily transmitted by a satellite carrier. Examples commonly include WTBS-TV, Atlanta, WWOR-TV, New York, and WGN-TV, Chicago.

[3] Cable Communications Policy Act of 1984. Pub. L. No. 98-549, 98 Stat. 2779 (1984).

would be the case, since the satellite carriers would control who would be able to receive the signal.

The Copyright Office supported enactment of the Satellite Home Viewer Act of 1988 to balance the interests of copyright owners with the interests of program providers and homeowners. Copyright owners receive compensation for the public performance of their works by satellite carriers. Homeowners get satellite programming for a reasonable price. Satellite carriers pay royalties for their use of copyrighted programming.

B. How the Act Works.

The Satellite Home Viewer Act of 1988 took effect on January 1, 1989, and will sunset after six years on December 31, 1994. The Act created a statutory licensing system in section 119 of the Copyright Act somewhat similar to that available to cable television operators under section 111. Section 119 permits, upon payment of a royalty fee, secondary transmission of "superstation" and network signals to satellite home dishowners or to a distributor that has contracted with a satellite carrier to provide the signals to satellite dishowners, provided that such signals are for private home viewing.

Secondary transmissions of network signals to satellite dishowners may only be made to those viewers who reside in "unserved households."[4] If a satellite carrier provides an unserved household with a network signal

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[4] Private individuals living in "unserved households" are those who (1) live in an area where they cannot receive an acceptable, or "grade B" network TV signal (as defined by the Federal Communications Commission) by using a conventional rooftop antenna, and (2) have not, within 90 days before the date on which that household signs up to receive retransmissions by a satellite carrier of a network station, subscribed to a cable system that provides the signal of a station affiliated with that network.

pursuant to the statutory license, it must submit to the network [5] that owns or is affiliated with the station transmitted a list of names and addresses of all subscribers that receive that signal. This list must be updated by the satellite carrier monthly, and failure to do so constitutes copyright infringement.

Section 119 provides for a monthly statutory royalty fee of 12 cents per subscriber per superstation received from a satellite carrier, and three cents per subscriber for each network signal received by the subscriber. Like the cable compulsory license, royalties are collected on a semiannual basis in the Licensing Division of the Copyright Office. Unlike the cable compulsory license, royalties are calculated for each six month period on a monthly basis, and must be submitted, along with the statement of account form the Office provides, one month after the closing date of each accounting period.

Congress established under the Satellite Home Viewer Act a temporary statutory license for four years, which is followed by a two-year voluntarily negotiated or arbitrated license. Although private agreements as to the royalty fee may be negotiated voluntarily at any time, the statutory royalty fee will end on December 31, 1992, and the two-year voluntary license phase begins.

On July 1, 1991, just a few days ago, the Copyright Royalty

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5 Networks must submit to the Register of Copyrights the name and address of the person to whom the satellite carrier lists should be provided. This information is placed in a public file.

Tribunal (CRT) [6] published a notice in the Federal Register about the start of negotiations to determine the royalty fees to be paid by satellite carriers for the remaining two years until the Act expires. Satellite carriers, distributors, and copyright owners entitled to royalty fees will negotiate the rate among themselves, or through designated common agents. Copies of these agreements must be filed with the Register within 30 days of execution.

On or before December 31, 1991, the CRT will publish a notice of the start of arbitration proceedings for those parties not already subject to voluntary agreements. An arbitration panel will be chosen and after proceedings will submit a report to the CRT recommending the proper royalty fees. Once accepted by the Tribunal as consistent with the terms of section 119(c)(3)(D), the fees become binding upon all parties not then subject to a voluntary agreement. The fees remain in effect until December 31, 1994, when all provisions of section 119 expire.

C. How the System Has Fared So Far.

Unlike the cable compulsory license of section 111, the satellite carrier license has been relatively easy to administer. The Copyright Office has not encountered problems with the system or the parties involved so far. As you can see by the statistics appended to this statement, payments under the government-set rate have come to more than five and a half million dollars in the two year period the Act has been in effect. Those fees have been deposited with the U.S. Treasury, and will be distributed to claimants

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[6] The Copyright Royalty Tribunal is also directed by the Satellite Home Viewer Act to distribute the royalties collected under the satellite carrier statutory license to the owners of the retransmitted programming.

by the CRT. Claimants have not yet been able to decide on how they wish to divide the royalties for the periods 1989/1 and 1989/2, and they have asked the CRT for more time to contemplate the issue. The first accounting period in 1991 just ended, and we have no reason to expect that the numbers will change much from those of the past two years. [7]

D. **Related Issues and Inquiries.**

1. Status of PBS Stations: Are they Network Stations?

Along with initial procedural decisions, such as developing the section 119 statement of account report and setting up filing deadlines and refund procedures, the Office faced the legal policy issue of defining the status of Public Broadcasting Service stations under 17 U.S.C. §119. Were they "network" stations?

It was difficult to determine whether PBS stations qualified as network stations because the language in the text of the new statute was not easily reconciled with language contained in part of the legislative history. Based on a single reference in the House Energy and Commerce Committee report, [8] the Office initially concluded that PBS should be treated as a network. [9]

However, in comments filed with the Office, PBS demonstrated that according to the definitions of "network station" and "superstation" in the

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7 The 1991/1 statements and royalties are due July 30, 1991.

8 "...the new statutory license for retransmission of network stations applies, at the present time, exclusively to those stations owned by or affiliated with the three major commercial networks (ABC, CBS, and NBC) and the stations associated with the Public Broadcasting Service." 134 Cong. Rec. 10426, 100th Cong., 2d Sess. (October 19, 1988).

9 See 54 Fed. Reg. 8350, 8352 (1989).

Act, and according to language found throughout the House Judiciary Committee's report and hearings on the Satellite Home Viewer Act, references to network stations meant affiliates of the three commercial networks only. After conducting research and review, the Office found itself in agreement with PBS's arguments.

Having argued that PBS stations are superstations under the Act, PBS announced it nevertheless wanted PBS stations to be treated as network stations for purposes of the scope of the license and the royalty rate. Retransmissions of PBS member stations under section 119 would be confined to homes in "unserved areas," and the three cent royalty rate would apply for retransmission of PBS stations, according to PBS's contentions.

The Copyright Office concluded that there was (and still is) a need to clarify the status of PBS stations under the Act, and that such clarification should come from Congress. Until such clarification is made, the Office accepts filings from satellite carriers using either the three cent royalty rate or the 12 cent royalty rate as applied to secondary transmission of PBS stations.

2. Should the Networks Share in Satellite Royalties?

The CRT issued a notice of declaratory ruling in CRT Docket No. 91-1-89SCD on May 3, 1991, regarding its 1989 satellite carrier royalty distribution proceeding. In December of 1990 a group of about 100 producers and/or syndicators of television series, specials, and movies (Program Suppliers) filed a motion with the CRT for a ruling that copyright owners of network programs are not entitled to share in the satellite carrier royalty

fees. Comments and reply comments were received from interested parties[10] before the CRT was to start distributing the first round of royalty fees collected under section 119.

The CRT determined that network program owners are entitled to share in the satellite carrier royalty fund, based on the clear and unambiguous reading the of terms of 17 U.S.C. §119. The Tribunal determined that the Act instructs it to distribute satellite carrier royalties to those copyright owners whose works were retransmitted by satellite carriers to home dishowners.

3. FCC Inquiries Under the Satellite Home Viewer Act: Who Can Sue for Price Discrimination?

When Congress enacted section 119, it included language directing the FCC to conduct three related studies. These included: (1) an investigation of the need for a universal scrambling standard for satellite programming; [11] (2) an inquiry and rulemaking into the feasibility of imposing syndicated exclusivity on the delivery of programming under the Act; [12] and (3) a report on whether and the extent to which there exists unlawful discrimination by satellite carriers against distributors in the

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[10] Parties included The Networks (ABC, CBS, and NBC) and Major League Baseball (supported by the NBA, NCAA and NHL) as well as ASCAP, BMI and Broadcast Claimants.

[11] Inquiry Into the Need for a Universal Encryption Standard for Satellite Cable Programming, 4 FCC Rcd 3479 (1989); 47 U.S.C. §605 (f)(g). The inquiry deals with all satellite cable programming and is not limited to superstations and network stations.

[12] Imposing Syndicated Exclusivity Requirements on Satellite Delivery of Television Broadcast Signals to Home Satellite Earth Stations Receivers, 4 FCC Rcd 3889 (1989); 47 U.S.C. §712.

provision of superstation and network station programming for private home viewing by earth station owners. [13]

With respect to the third item, the Commission's study of discrimination in delivery of satellite programming to home dishowners took two phases. [14] In the first phase, the Commission concluded that:

> (a) Satellite delivered superstation and network station programming is accessible to home earth station users both directly from satellite carriers and through a variety of entities servicing them as distributors;
>
> (b) Based on the evidence in the record, there appeared to be no general pattern of unlawful discrimination by satellite carriers among the various entities operating as distributors of superstation and network station programming to home earth stations;
>
> (c) Evidence has been submitted indicating that satellite carriers are charging higher rates for programming provided to home dish distributors than rates charged for cable distribution. The record contains little or no information as to the reasons for these differences, making it impossible for us to determine whether the higher rates are just and reasonable. Because this evidence raises serious concerns about the competitive nature of this market, and the impact on consumers, we intend to initiate a further notice of inquiry in order to develop a more complete record on this issue. [15]

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13 Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming (1989); 47 U.S.C. §713.

14 4 FCC Rcd 3883 (1989); 5 FCC Rcd 523 (1989).

15 5 FCC Rcd 523 at para. 6(c).

A further notice of inquiry was issued in 1990. [16] The FCC concluded, among other things, that "some home dish distributors are paying rates that are substantially in excess of the rates being charged to cable companies and others, and that the extent of those rate disparities has not been adequately justified in the record before us based on the carriers' costs." [17] Applying a test like that used under section 202(a) of the Communications Act to assess "whether...there exists discrimination described in Section 119(a)(6) of Title 17," the FCC concluded that there may be violations of the Copyright Act.

Specific complaints of unlawful discrimination have been filed with the Commission by the National Rural Telecommunications Cooperative. The FCC reported that these will be evaluated pursuant to section 208 of the Communications Act. In addition, the FCC noted, redress for violations of 17 U.S.C. §119(a)(6) may be sought under 17 U.S.C.§§501, 502-506, and 509.

Section 119(a)(6) makes the "willful or repeated secondary transmission" of copyrighted programming actionable as an act of infringement if the satellite carrier "unlawfully discriminates against a distributor." Standing to sue is governed by the general infringement provision of section 501(a) (authorizing copyright owners to sue). Section 501(e), which was added by the Satellite Home viewer Act, authorizes suit by network stations with respect to violations of the "unserved households" restriction on the

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[16] Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming. Further Notice of Inquiry, 5 FCC Rcd 3760 (1990); Second Report in Gen. Docket No. 89-88. FCC 91-160 (May 9, 1991).

[17] Id.

satellite carrier license. Copyright owners have shown no disposition to sue for infringement based on price discrimination by satellite carriers. A distributor does not have standing to sue unless it is also a copyright owner of an exclusive right. The distributors had asked Congress to give them standing to sue in passing the Satellite Home Viewer Act, but the proposal was opposed by copyright owners on the ground that only copyright owners (or their licensees) should have standing to sue for infringement. Congress directed the FCC to monitor marketing practices, instead.

II. COPYRIGHT-TELECOMMUNICATIONS POLICY ISSUES

A. Must Carry.

The issue of required carriage of broadcast signals by cable operators, also known as "must carry," continues to remain relevant to the cable compulsory licensing scheme. Cable operators pay royalties under the compulsory license principally based on the number of distant signals which they carry, and the "must carry" rules of the FCC in effect on April 15, 1976 help define when a particular broadcast station is distant to a cable system and when it is local. Section 111(f) provides that the "local service area of a primary transmitter" (i.e. local broadcast station) comprises an "area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976...." Thus, while the FCC "must carry" rules have been struck down by the courts as a matter of communications policy, [18] they continue to have effect in the determination of local versus distant signals and the computation of royalty fees.

Several bills introduced in this Congress seek to remedy the current absence of "must carry" rules for communications policy purposes. H.R. 2043, the Cable Subscriber Protection Act of 1991, would amend section 111 of the Copyright Act and conditions availability of the cable compulsory license to cable operators on compliance with the former FCC "must carry"

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[18] Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986); Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987) cert. denied, 446 U.S. 1032 (1988).

rules. Cable operators wishing to utilize the cable license would be required to carry local broadcast stations, but would remain free to choose the distant signals they wish to carry. Any cable operator choosing not to carry the signal of a local broadcast station, as defined in the bill, would not qualify for compulsory licensing for any other local or distant broadcast stations which it carried.

H.R. 2043 is premised on a carrot rather than a stick approach. Where the courts found a first amendment infirmity with government imposed mandatory carriage of local broadcast signals, H.R. 2043 recognizes that cable operators have no first amendment entitlement to the benefits of the cable compulsory license. Cable operators therefore remain free to carry the broadcast stations they wish, provided they negotiate licenses for all the copyrighted works contained in the broadcast programming which they elect to carry. However, if cable operators comply with the former FCC "must carry" rules, they may avail themselves of the compulsory license as they have in the past.

H.R. 1303, the Cable Television Consumer Protection and Competition Act of 1991, likewise contains a "must carry" requirement. Cable systems operating within 50 miles or within specified signal strength parameters of commercial and noncommercial stations are required to carry those stations, subject to certain channel limitations of the cable operator. To maintain continued carriage however, commercial broadcast stations are required to maintain certain viewership standards, except that minority-owned or minority-oriented stations are exempt from the standard. In the case of

commercial television, low power and translator stations are not entitled to mandatory carriage.

S. 12, the Cable Television Consumer Protection Act of 1991, also contains a "must carry" component. However, unlike H.R. 2043, S.12 creates a new "must carry" regime by adding new sections 614 and 615 to the Communications Act of 1934. The new "must carry" rules would require cable operators to carry local commercial broadcast stations, qualified low power stations, and qualified noncommercial educational stations in accordance with specified provisions. The new "must carry" rules would not directly impact the cable compulsory license, even though the definition of a local broadcast signal is broader than the rules in effect in 1976. The bill provides that where the new "must carry" provisions require carriage but the broadcast signal would be considered distant for copyright purposes, the broadcaster is responsible for the distant signal royalty fees incurred by the cable operator. Also, unlike H.R. 2043, there is no conditioning of the availability of the compulsory license on compliance with the new "must carry" provisions.

An interesting aspect of S.12, as marked-up by the Subcommittee on Communications, is an amendment of section 325 of the Communications Act to provide broadcasters with a right of retransmission consent. The bill gives broadcasters a choice; they may insist on carriage of their signal by a cable operator providing that they qualify for "must carry" status, or they may grant retransmission consent to those cable systems wishing to carry their signal. The retransmission consent provisions of S.12 are discussed in detail below.

C. **Retransmission Consent**.

S.12 provides that one year after enactment of the bill "no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, without the express authority of the originating station...." Cable operators wishing to carry a broadcast signal, either local or distant, must first obtain the permission of the broadcaster to do so. However, in the situation where the broadcaster could have insisted upon carriage according to the bill's "must carry" provisions, the broadcaster must decide whether it wishes its signal to be carried on a "must carry" basis or on a retransmission consent basis.

The concept of retransmission consent is not new to communications policy; it has its beginnings in the early days of radio. Section 28 of the 1927 Radio Act provided that "nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station." Senator Dill, the bill's sponsor, explained the reason for the provision:

> As to Section 28, providing that no person, firm or corporation shall rebroadcast the material broadcast by a station without that station's consent, it is, I think, a very necessary provision. Otherwise we would have a broadcasting station spending a large amount of money to prepare and present a program as a program from that station, and then under the modern methods of rebroadcasting it could be picked up and broadcast from other stations, and particularly over the wired wireless, and money charged for listening to it. The provision referred to does not prevent rebroadcasting, but it does require those who would rebroadcast to get permission from the original broadcaster...It [rebroadcasting] has a generally understood meaning, namely the

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> reproduction by radio of the broadcasting waves.

68 Cong. Rec. 2880 (1926). The language regarding retransmission consent was adopted verbatim into section 325 of the Communications Act of 1934, under which the FCC currently operates.

Although section 325 requires retransmission consent for broadcasters, the FCC decided early on in its regulation of the cable industry that section 325 did not require cable operators to obtain consent for their retransmission of broadcast signals. In Report and Order in Docket 12443, 26 FCC 403, 429 (1959), the Commission concluded that by its terms, section 325 retransmission consent did not apply to cable systems, and noted that Senator Dill's statement regarding the provision in the 1926 Radio Act "would seem to exclude reproduction or distribution by wire as in the case of CATV's." The Commission did, however, request Congress to amend section 325 to include cable retransmission, finding that "it is desirable to clarify the situation with respect to property rights" and also "desirable to place the CATV under the same conditions as the broadcaster with respect to access to programs orginated by other stations." Id. at 438. No legislative action was taken.

In 1966, the FCC asserted a strong regulatory stance over the cable industry. In its Second Report and Order in Docket No. 15971, 2 FCC2d 725 (1966), the Commission once again recommended that Congress consider applying the Section 325 retransmission consent provisions to cable operators, citing the "anomalous conditions under which the broadcasting and CATV industries compete." Id. at 787. No action was taken by the Congress.

In 1968, the FCC began its own experimenting with retransmission consent for cable operators. In Notice of Proposed Rulemaking in Docket

18397, 15 FCC2d 417 (1968), the Commission proposed to adopt its own retransmission consent requirement, noting that what was needed was a "meld of copyright, communications and antitrust policies." Id. at 433. The retransmission consent proposal allowed some experimental operations while the rulemaking proceeding was in progress. Cable systems importing distant signals were required to obtain consent of the broadcaster, but carriage of local signals and existing carriage of distant signals were grandfathered so that no consent was required. The experiment proved to be a failure, apparently because broadcasters of distant signals uniformly refused to grant retransmission consent. It was against this background that Congress began to consider copyright compulsory licensing, and retransmission consent for cable systems lost momentum.

The most important aspect of the history of retransmission consent before the FCC was its mesh with copyright policy. The Commission's experiment with retransmission consent occurred at a time when there was no such thing as the cable compulsory license and the Supreme Court had found cable retransmissions were not subject to copyright protection. In short, as the Commission acknowledged, retransmission consent had as much to do with copyright as it did with communications policy. The Congress changed that scenario, however, when it passed the cable license in 1976. Therefore, consideration of the retransmission consent provisions in S.12 must be framed against the purpose and goals of the Copyright Act and the cable compulsory license.

The concept of retransmission consent in the context of compulsory licensing was addressed in Malrite T.V. of New York v. FCC, 652 F.2d 1140

(1981), cert. denied, 454 U.S. 1143 (1982). The case involved review of the FCC's decision to deregulate cable. The National Telecommunications and Information Administration (NTIA) of the United States Department of Commerce petitioned the FCC for adoption of retransmission consent if it eliminated the distant signal and syndicated exclusivity rules. In rejecting the NTIA's position, the court observed:

> Retransmission consents would undermine compulsory licensing because they would function no differently from full copyright liability, which Congress expressly rejected. Under the NTIA proposal cable operators would be forced to negotiate individually with numerous broadcasters and would not be guaranteed retransmission rights, a scenario Congress considered unworkable when opting for the compulsory licensing arrangement. A rule imposing a retransmission consent requirement would also directly alter the statutory royalty formula by precipitating an increase in the level of payments of cable operators to obtain consent for program use. Such a rule would be inconsistent with the legislative scheme for both the specific compensatory formula and the appropriate forum for its adjustment.

652 F.2d at 1148.

While the Malrite court was addressing retransmission consent in the context of FCC authority to impose such regulation, the court's language is still enlightening for the retransmission consent provisions of S.12, particularly since the bill expresses the view that it does not affect the cable compulsory license or copyright policy. The Copyright Office sides with the position expressed by the Malrite court that retransmission consent does have an effect on the compulsory licensing scheme and alters the copyright balance struck in 1976.

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The retransmission consent provisions of S.12 alter the fundamental principle of the compulsory licensing scheme: signal availability. The license provides cable operators with the right of retransmission upon payment of the statutory royalty fee. Although Congress was sensitive to the rules and regulations of the FCC, it certainly did not envision in 1976 that cable operators would be required to obtain additional retransmission rights outside of the license, either from broadcasters or copyright owners. Retransmission consent effectively permits broadcasters to stop the operation of the compulsory license through withholding consent of retransmission to a cable operator. Furthermore, retransmission consent upsets the flow of royalties to copyright owners envisioned by Congress in 1976. Cable operators will, in many circumstances, be required to pay not only a copyright fee, but a retransmission fee as well. Beside the unanticipated additional cost to cable operators to carry broadcast signals, additional monies will presumably flow to copyright owners as contracts between programmers and broadcasters are renegotiated to take account of the additional revenue stream generated by retransmission consent.

While retransmission consent will be required for cable systems, S.12 provides that it will not be required for satellite carriers at least until the current expiration of satellite carrier compulsory license. Thus, broadcasters which currently operate as "superstations" will not have a right of retransmission consent vis-a-vis satellite carriers retransmitting their signals until section 119 of the Copyright Act expires on December 31, 1994. This provision of S.12 is troubling to the Copyright Office because it creates a potential conflict with congressional renewal of the satellite

carrier license. Should the license be extended or made permanent after 1994, retransmission consent for satellite carriers will raise the same concerns expressed above for cable systems. Thus, while S.12 would appear not to have any effect on the current satellite carrier compulsory license, it may limit Congress's ability to reconsider the license in 1994.

In sum, the Copyright Office believes that the retransmission consent provisions in S.12 operate as surrogates for copyright exclusivity and have serious and significant copyright implications which warrant closer scrutiny by the Congress.

D. Definition of a Cable System.

The Copyright Office released a Notice of Proposed Rulemaking in Docket No. 86-7B, the definition of a cable system, which is scheduled for publication July 10, 1991. The Office instituted the proceeding back in 1986 as a result of a number of royalty filings by Satellite Master Antenna Television (SMATV) systems and Multichannel Multipoint Distribution Service (MMDS) systems claiming that they qualified for the cable compulsory license. SMATV's are independent video programming providers which typically serve multiple dwelling units such as apartment houses, condominiums, and motels. MMDS systems function similarly to traditional cable systems and are referred to as "wireless cable" by virtue of their principal use of microwave rather than wire to deliver signals to subscribers. While the Office initially took comment from the public on the qualification of SMATV and MMDS for the cable compulsory license, it expanded the proceeding in 1988 to consider satellite carriers qualifications for the license as well.

The definition of a cable system appearing in section 111 of the Copyright Act provides that:

> A "cable system" is a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables or other communications channels to subscribing members of the public who pay for such service.

17 U.S.C. 111(f). The Office must apply this definition, along with any accompanying legislative history, to the operations of SMATV's, MMDS's, and satellite carriers to determine their status as cable systems for copyright purposes. The task has proved to be a particularly vexing one, which is why the Copyright Office is offering proposed rules rather than final ones, and is certainly an issue worthy of congressional consideration.

Of the three types of facilities considered for compulsory licensing, satellite carrier facilities were the poorest fit to the definition of a cable system. Satellite carrier facilities are principally located in geostationary orbit above the earth, and therefore do not meet the definitional requirement of being located in a "State, Territory, Trust Territory or Possession." The Copyright Office was also persuaded by the reasoning of the district court in Pacific & Southern Co., Inc. v. Satellite Broadcast Networks, Inc., 694 F. Supp. 1565 (N.D. Ga. 1988) which held that the Satellite Broadcast Network, a satellite carrier, did not qualify as a cable system under the compulsory license. Finally, the passage of the Satellite Home Viewer Act in 1988 inferred that by virtue of creating a new statutory compulsory license for satellite carriers, the carriers did not qualify for

compulsory licensing as a cable system. The Copyright Office has, therfore, concluded in its Notice of Proposed Rulemaking that satellite carriers are not cable systems within the meaning of section 111.

The compulsory license status of SMATV's and MMDS's, however, is not as easy to determine. Convincing arguments were made by commentators for inclusion of both, of one or the other, and exclusion of both. Fundamental to these arguments is the commentators' underlying view of how expansive the cable compulsory license should be read. Generally, those who argued that both facilities qualified as cable systems expressed the opinion that the license should be interpreted broadly to encompass many or all new forms of video transmission technology. Those who argued that one or more of the facilities did not qualify for compulsory licensing generally interpreted section 111 more strictly. After considering the comments and reviewing the legislative history and background to the adoption of section 111, the Copyright Office has chosen to view the compulsory license strictly according to its terms: "Nothing in the legislative history suggests that Congress intended an open-ended definition of the entities qualifying for the license. To the contrary, the compulsory license is hedged and qualified by strict limitations." __ FR __.

The Copyright Office proposes that SMATV facilities are cable systems within the meaning of section 111, but MMDS facilities are not. These preliminary conclusions are based on a literal interpretation of the terms of the statute against the regulatory background of SMATV and MMDS systems in 1976.

MMDS facilities apparently are not cable systems under section 111 for principally two reasons. First, they do not meet the cable definition's requirement that the secondary transmissions be made "by wires, cables or other communications channels." As noted above, MMDS facilities' dominant means of retransmission is via microwave broadcast. While commentators urging inclusion of MMDS facilities within the cable system definition argued that the phrase "or other communications channels" could be read broadly enough to encompass MMDS, there is absolutely no evidence that Congress envisioned in 1976 a cable system which operated without wires as the predominant mechanism for distributing programming services to subscribers. Hence, "other communications channels" was not intended to mean systems which used retransmission means other than cables and wires, but only those that used other means, such as microwave, in addition to cables and wires.

The Copyright Office's strict interpretation is confirmed by a consideration of the regulatory background of MMDS at the FCC. The Commission's Report and Order interpreting the definition of a cable system appearing in the 1984 Cable Act proved particularly helpful to this proceeding. It is evident that the Commission did not regulate either MDS [19] or MMDS facilities as cable systems in 1976, nor had it ever considered MDS or MMDS to be a cable system. Given the interplay of the compulsory license with communications policy and Congress's decision to condition compulsory licensing on the "rules and regulations of the Federal Communications Commission," it is logical to conclude that MMDS facilities would not be

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19 Multipoint Distribution Services (MDS) existed in 1976 and were restricted to two channels by FCC regulations. Multichannel distribution (MMDS) was not authorized until 1983.

cable systems for copyright purposes when they were clearly not cable systems at any time under the regulations of the FCC.

Since the Office has only made a preliminary finding, we will continue our existing practice and will not refuse to accept Statements of Account and royalty fees from MMDS operators, if they wish to file. Such filings are accepted for whatever validity they may have, pending a final judicial determination, if any.

In considering SMATV facilities, the Office applied the same strict statutory interpretation against the regulatory background and concluded that SMATV's may qualify for compulsory licensing. Unlike MMDS systems, SMATV's operate principally by cables and wires, as well as meeting all of the other definitional requirements. Also, the FCC has had a tradition of regulating at least some SMATV facilities as cable systems, demonstrating that in 1976, certain kinds of SMATV facilities were cable systems in accordance with the "rules and regulations of the Federal Communications Commission." The Copyright Office therefore does not feel that it is expanding the cable definition to encompass SMATV's.

Once again, the Office stresses that it is only offering proposed regulations at this time, and will be seeking further public comment and information. The definition of a cable system is a difficult issue which admits of no easy answers, and even the Office's preliminary decision to include SMATV's presents its own set of serious administrative difficulties. The very difficult administrative policy issues include the following: 1) the definition of "gross receipts" for the secondary transmission service; 2) the identification of who are the subscribers to the SMATV service; 3)

who is the operator of the SMATV service for purposes of filing Statements of Account and paying statutory copyright royalties; and 4) application of the FCC's former cable carriage rules to SMATV's, most of whom were exempt from the cable carriage rules.

The Office would welcome congressional guidance or intervention at this time to solve these difficult interpretive policy issues regarding the applicability of the cable compulsory license in the case of both SMATV and MMDS facilities.

III. CONCLUSION

The statutory license phase of the Satellite Home Viewer Act has functioned well and has presented few administrative policy issues. The Copyright Royalty Tribunal resolved one issue: the right of networks to share in the royalty pool. One interpretive issue remains unresolved: what is the appropriate royalty rate for retransmission of Public Broadcasting Service stations, 12 cents per subscriber or 3 cents? As we approach the second phase of the Act (voluntary or arbitrated license fees), the question of price discrimination by program distributors will bear careful examination.

Policy issues continue to arise regarding the cable compulsory license. Broadcasters seek legislation to establish "must carry" as a statutory right and may also seek legislation according them a right of retransmission consent. In essence, retransmission consent is the equivalent of copyright exclusivity and would appear to conflict with the existing cable compulsory license. Whether SMATV or MMDS facilities qualify as cable systems under the section 111 compulsory license are major administrative policy issues. The Congress may wish to consider legislation either to clarify the definition of cable system or, if appropriate, to establish a separate statutory license, perhaps similar to the Satellite Home Viewer Act license.

APPENDIX

SATELLITE CARRIER STATUTORY LICENSE SUMMARY

ACCOUNTING PERIOD	ROYALTY FEES	STATEMENTS OF ACCOUNT
1989/1	$ 1,088,677.39	4
1989/2	1,334,880.11	5
TOTAL 1989	$ 2,423,557.50	9
1990/1	$ 1,515,974.06	5
1990/2	1,639,038.14	6
TOTAL 1990	$ 3,155,012.20	11
GRAND TOTAL	$ 5,578,569.70	20

The 1991/1 Statements and royalties are due July 30, 1991.

The Licensing Division has not encountered any problems in administering the Satellite Carrier Statutory License.

The following satellite carriers have filed with the Copyright Office:

1. Eastern Microwave, Inc.
2. K Prime Partners, L.P.
3. Netlink USA
4. Prime Time 24 Joint Venture
5. Southern Satellite Systems
6. United Video, Inc.

Mr. HUGHES. Let me just pick up right there with section 111 and the definition of a cable system and your preliminary conclusion that MMDS facilities do not fit within the definition of "by wires, cable, or other communications channels." If I understood your statement in chief and your testimony today, it is the preliminary conclusion of the Copyright Office that the term "or other communications channels" basically was meant to relate back to cables or wires?

Ms. SCHRADER. Meant to relate to a facility that distributes by wires and then, in addition——

Mr. HUGHES. In addition?

Ms. SCHRADER [continuing]. Uses other communications channels.

Mr. HUGHES. Microwaves?

Ms. SCHRADER. We think there is a reference in testimony of the former Register, Barbara Ringer, to the other communications channels as meaning microwave, but we don't conclude from that that if you distribute primarily by microwave, that Congress intended that you would be eligible for the cable compulsory license.

The basic issue is whether virtually any video programming service that has subscribers is entitled to the cable compulsory license. If wireless cable is eligible, then probably direct broadcasting satellite distribution will be eligible for the cable compulsory license. It's a major question.

Mr. HUGHES. I suppose you could argue forcefully that there wouldn't be any need for the home satellite legislation of 1988 if it were so interpreted; that is, there would have been no need to pass legislation in 1988 to regulate satellite transmissions if, in fact, you interpreted "or other communications channels" to include wireless cable. I could understand the interpretation if section 111 said, "by wires, cables, and/or other communications channels," but it doesn't say that.

Ms. SCHRADER. That's true, but, of course it's fairly frequent in legislation that "or" is used in a way that doesn't mean that it is strictly an alternative.

Mr. HUGHES. What is it in the definition of cable systems in section 111 that leads the Copyright Office to conclude that the term "or other communications channels" means in addition to wire or cable?

Ms. SCHRADER. We have reached that conclusion based on an examination of the total environment in which Congress legislated in 1976. Clearly——

Mr. HUGHES. You mean utter chaos?

[Laughter.]

Ms. SCHRADER. Not really—well, perhaps. But, at least with reference to the existing cable industry, with reference to the existing regulatory environment at the FCC, and for us, at least in preliminary finding, it's persuasive that the FCC has never regulated any MMDS as a class as a cable system. Now this is different, of course, in the case of SMATV's where some SMATV's are treated as cable systems by the FCC, although most of them are not. Most of them are exempt from the rules, but MMDS as a class is not subject——

Mr. HUGHES. Well, SMATV presents a different problem, as you've articulated, than MMDS's present, some different policy issues.

Ms. SCHRADER. Yes, there are very difficult administrative policy issues fitting them into the compulsory license. I mean, basically, because the royalty formula is so complex. The royalty formula is based on the distinction between local and distant signals and the rules and regulations of the FCC that authorized cable carriage back in the seventies.

Mr. HUGHES. Since 1988, the Royalty Tribunal has been collecting copyright fees from MMDS's; is that correct?

Ms. SCHRADER. We assume—in fact, we know—that some MMDS operations have been paying into the cable compulsory license, as have some SMATV's and some satellite carriers did, at least before 1989. We don't have a definite list of all of the entities because sometimes, for one thing, the report that we receive does not require them to identify themselves as wireless cable, and often the name may not disclose the identity as wireless cable.

Mr. HUGHES. But, the point is in 1988, 1989, and 1990, and up until this time, we have collected fees. We have accepted the fees——

Ms. SCHRADER. Yes, we have, and we propose to continue to do that until we issue final rules.

Mr. HUGHES. Why has it taken us so long to reach some preliminary decision on this issue?

Ms. SCHRADER. Well, it's been a very difficult one for the reasons that I gave—the administrative policy problems related to SMATV's.

Mr. HUGHES. Why didn't we bring it to a head sooner? Why didn't we bring it to some——

Ms. SCHRADER. Perhaps, in retrospect, we should have done that. This is the first hearing that we've had on an oversight of the satellite carrier license. I don't recall any other hearings on cable policy issues in the last few years.

Mr. HUGHES. Moving on to another area, I appreciate your detailed examination of retransmission consent, particularly its history, the Malrite decision, and your conclusion that retransmission consent has an effect on the cable compulsory licensing scheme and alters the copyright balance struck in 1976. I found that very interesting, very helpful to me, and I'm sure to other members of the subcommittee.

Realistically, if a consensus exists that retransmission consent should become the law, shouldn't this committee take steps to eliminate the cable compulsory license?

Ms. SCHRADER. That is one possible result, yes, certainly. If it's possible to have sufficient diversity of television programming through a system of exclusive license arrangements, the Copyright Office would have no problem with supporting that outcome.

Mr. HUGHES. As a matter of policy, do you believe that, with or without consensus, it's good policy given the evolution of the technology, given the interests that are to be protected? Would that represent good public policy?

Ms. SCHRADER. I can't say anything more at this point than that it might be a good solution. Another possibility, of course, would be

to reform the cable compulsory license, not to eliminate it completely, but to do away with some of the complexity that is really unnecessary and not helpful. You could perhaps put the royalties on a per-subscriber basis, or perhaps change the formula regarding local versus distant signals to take care of some of the anomalies that have crept up since Congress acted in 1976.

Mr. HUGHES. From a jurisdictional perspective, won't the retransmission consent provisions in Senate bill S. 12 prevent this committee from making a determination about extending the Satellite Home Viewer Act of 1988 scheduled to sunset in 1995?

Ms. SCHRADER. We think it would present a conflict with renewal of the carrier license. If the bill were to pass in its present form in the Senate, the retransmission provision would kick in in 1995, and at that point you effectively would not be able to institute a renewal of the satellite carrier license without changing whatever you did regarding retransmission consent.

Mr. HUGHES. Finally, do you think that the retransmission consent policy and proposal is consistent with the cable compulsory license system? Is it compatible?

Ms. SCHRADER. It's not compatible with the existing cable compulsory license and probably it would be difficult to fashion a statutory license that could survive when you have the power to withhold consent. If there were some sort of provision that, in effect, maybe required arbitration as a last resort with respect to retransmission consent, it might be possible to work the two out then.

Mr. HUGHES. At the very least, it would be a major realignment of the concept——

Ms. SCHRADER. Yes.

Mr. HUGHES [continuing]. Of cable compulsory license, a change of the balance that was struck in 1976?

Ms. SCHRADER. Yes, we think so.

Mr. HUGHES. The gentleman from Virginia.

Mr. BOUCHER. Thank you very much, Mr. Chairman.

Ms. Schrader, I would like to join with the chairman in welcoming you again before this subcommittee. You have done your usual thorough job in briefing us on a wide array of complex issues. I do disagree with some of your conclusions, but I admire the process that you've gone through to bring them to us.

Let me start with just a matter of information. Can you tell us today how much of a fee is paid for the retransmission of local signals pursuant to the cable compulsory license? What is that fee per subscriber per month?

Ms. SCHRADER. Are we speaking of the cable compulsory license?

Mr. BOUCHER. The cable compulsory license, just with respect to local signals.

Ms. SCHRADER. Well, I would respond by saying that the cable compulsory license is based primarily on royalties for distant signals. There is a fee for local signals if there is no retransmission of a distant signal. In other words, there is a minimum fee that must be paid——

Mr. BOUCHER. And that's the fee I'm asking about.

Ms. SCHRADER. Yes. The fee is something less than 1 percent of gross receipts. I don't have the exact figure with me.

Mr. BOUCHER. I would be pleased if you would just submit that to me later or perhaps for the record, Mr. Chairman, if that is appropriate.

Mr. HUGHES. Certainly.

Ms. SCHRADER. Yes, we will try to do that.

[The Copyright Office reports the following:]

For the accounting period covering the first half of 1990, the Copyright Office estimates that approximately $150,000 was paid for carriage of local broadcast signals.

Mr. BOUCHER. And, again, to state the question, it is the fee that is paid for the retransmission of the local signal only under the cable compulsory license. I've asked that question to six people. No one seems to know. You're the most logical source of that information, and I would appreciate that.

Now let me move on to some matters of policy. I was, frankly, very surprised at your preliminary—I think you have phrased it as "tentative"—decision with respect to the application of the cable compulsory license to MMDS. I, frankly, think that you're wrong in that preliminary conclusion. The language very clearly says that the cable compulsory license will apply to any system that retransmits signals through the means of wires, cables, and then it says "or other forms of communication." My personal conclusion is that what Congress meant when it passed that phrase was to encompass potential new technology that would come along, such as MMDS or other means of communication of which we may not be aware today that would perform precisely the same function that cable systems are performing.

Now if you look at what MMDS does practically, they really do mimic cable systems locally. They are transmitting the same product. They're transmitting that product to the same audience. They are head-on-head competitors with local cable systems and behave in precisely the same way in terms of business practice. The only thing that differs is that they don't use wires or cables; they use other forms of communication. I would suggest to you that the cable compulsory license, when enacted, squarely intended that that be encompassed.

Let me raise another practical consideration, and that is this: if we do not extend the cable compulsory license to MMDS, I strongly fear for the continuation of that business. As a matter of fact, the cable compulsory license is what keeps them in a practical position today to clear their copyrights. Now they've been utilizing it; you've been accepting their fees, but in the absence of that ability to clear the copyrights, look at the task to which they're going to be put. They're going to have to negotiate separately with every single copyright owner in order to carry the signal. I can't think that Congress, in enacting the cable compulsory license years ago, would have intended that every new means of competing with the cable industry that came along would be put to that literally impossible task in order to stay in business. It would make a lot more sense practically and in interpreting the exact words of this statute to have extended the cable compulsory license to MMDS. I would strongly urge you to reconsider. I think that a stronger case is made, just reading the language of the statute itself, to apply the compulsory license to MMDS than not to do so.

There's another practical consideration that I'd like to mention, and that is this: several years ago this subcommittee reported a bill that extended the cable compulsory license to low-powered TV. That was not particularly controversial. It's a small enough market. There really isn't in the case of low-powered TV a serious threat posed to the cable industry. They're not real competitors.

MMDS, however, is. It's an industry that is in its infancy today, one that will grow in strength as the years go by. I have every reason to believe that if we try to report a freestanding bill here that extends the cable compulsory license to MMDS as a way to fill in the policy gap which you suggests exists, that the cable industry will oppose that very strenuously. I'm not totally confident at this point that we'll have the ability to pass that bill.

So, there are very serious practical problems that may confront us in terms of extending legislatively the cable compulsory license to MMDS. I would just suggest to you again that you might want to reconsider, and I'm not even going to ask you to respond to that at this time.

Now let me move on to another area where I will ask a question. It is clear, based on your presentation today and the conclusions of others with whom I've had discussions, that under the Home Satellite Viewer Act of 1988, third-party packagers who are injured by the price discrimination that the FCC has found to exist do not have standing to sue as a result of that price discrimination. Now they're the ones who are really hurt. It's not the copyright owners who are hurt. It's the third-party packagers who are hurt. Yet, they don't have standing to address that injury under the Home Satellite Viewer Act. That remedy is reserved only to the party that's not injured, the copyright holder.

You have not made a recommendation as to whether we should extend the standing to the third-party packagers, but I would like to ask you today what your opinion of that is. Shouldn't we do it, in view of the fact that they are the ones who are injured by the price discrimination that we know exists?

Ms. SCHRADER. We agree, of course, with the legal analysis. We've said in our statement that these distributors do not have standing to sue. We've also noted that Congress considered that issue before passing the satellite carrier license, and the Copyright Office is aware of various drafts, in fact bills that were pending in which the satellite carriers would have been given—I'm sorry, the distributors would have been given standing to sue in case of unlawful discrimination.

In the end, as part of legislative compromise, obviously the standing was dropped as far as the distributors are concerned. The Copyright Office at the time supported those bills; that is, the bills that would give the distributors standing to sue, and I think we would probably support the provision in the future. It's not one that we have a particularly strong view about. We do understand the concern of copyright owners that they don't want to add a lot of noncopyright holders who have standing to sue under the Copyright Act. This may be a special enough situation, and if the Congress feels that it cannot redress the problem any other way, then it might be worth trying to confer standing to sue as a remedy.

Mr. BOUCHER. Not exactly a ringing endorsement. On the other hand, I don't detect in your answer any opposition to the notion that we should enact a statutory right of standing for third-party packagers.

Ms. SCHRADER. That's right.

Mr. BOUCHER. OK. Now let me move on to the question of the interplay between retransmission consent and the cable compulsory license. I disagree with your conclusion that they cannot coexist, and I do so for this reason: the only real effect that retransmission consent would have on the operation of the cable compulsory license is to perhaps have a couple of local broadcast stations paid a fee simultaneously with its operation. It would operate perfectly for these and all of the others. It is completely compatible to have retransmission consent under which a local broadcast station receives compensation from the cable system for the value of its signal as a whole, taking into account its ratings, its reputation in the community, things that arise above and beyond the mere copyright interest, and at the same time to have the copyright interest cleared through the cable compulsory license with a small fee, one that you're going to tell us the exact amount of, paid into the Copyright Royalty Tribunal for the retransmission of those signals.

I'm sorry, but I just don't see any incompatibility at all between the coexistence of those rights, and perhaps you could clarify how they are inconsistent.

Ms. SCHRADER. As we analyze the issue, it gets down to the question of the power to withhold consent. The broadcaster can say no. Now it may well be that in virtually no case will the broadcaster say no. If that's the case, then the transmission takes place, and you're right: The cable compulsory license could be used as the vehicle for paying the royalties for programming. But, as I said, a broadcaster has the power to say no. So I have to assume that that power might be exercised at least in one or more cases. If it is exercised, then that signal cannot be retransmitted; the cable system doesn't have access to the signal as was intended under the cable compulsory license. If they should violate the denial of the consent, if they should go ahead and pick the signal up, not having consent, it's our understanding that this would, under the Senate bill, be a violation of the rules and regulations that the FCC will be issuing to carry out the provisions of this act.

And if it's a violation of the rules and regulations of the FCC, then the Copyright Act itself provides that you cannot have the compulsory license. The carriage must always be in accordance with the rules and regulations of the FCC.

Mr. BOUCHER. All of what you say is accurate. I don't think you've suggested, though, why those two rights cannot exist simultaneously. To the extent that a broadcast station gives its consent, it is then carried on the cable system. Some payment obviously would be made by the cable operator to the broadcaster for that right, and then under the cable compulsory license for that station, the copyrights are cleared and royalties are paid into the CRT with respect to those local signals.

Have I correctly described the way it would operate? Do you disagree with that?

Ms. SCHRADER. No, I don't disagree with that. As you've said, the point really——

Mr. BOUCHER. So, they are on those terms compatible. That's the simple point I'm trying to make with you.

Ms. SCHRADER. But, the problem is that they may withhold consent. The history of retransmission consent when it was tried by the FCC was that the broadcasters did withhold consent.

Mr. HUGHES. The time of the gentleman has expired.

Mr. BOUCHER. All right. Mr. Chairman, could I ask one additional question? It will be fairly brief.

Mr. HUGHES. Yes.

Mr. BOUCHER. In the event that we are put to the task of having to try to extend the cable compulsory license to MMDS, do you have a recommendation for how statutorily that ought to be accomplished? Do you have a draft of a bill that we should——

Ms. SCHRADER. We have looked at the question, and one could make an amendment of the definition of cable system by making a specific reference to MMDS. We would in that case also urge that you make a specific reference to SMATV's as well, so that both are clear. But, it would be possible to amend the definition, section 111(f).

Mr. BOUCHER. All right. And you would simply do it, then, by adding MMDS and SMATV to the existing definition of what is a cable system for purpose of the compulsory license?

Ms. SCHRADER. Yes.

Mr. BOUCHER. OK. Thank you very much.

Mr. HUGHES. The gentleman from California is recognized for 5 minutes.

Mr. MOORHEAD. Thank you.

Welcome. I guess you've had a pretty good workout already.

[Laughter.]

Mr. MOORHEAD. The FCC recently concluded that some home dish owners are paying rates that are substantially in excess of the rates that are being charged to cable companies. If this rate disparity does not appear to be justified, do you have any suggestions about how to remedy this unjustified price discrimination? And should we give standing to bring suit under copyright by those parties injured by the discrimination, like the Rural Electric Cooperative Association?

Ms. SCHRADER. As I responded to Mr. Boucher, we supported the versions of the satellite carrier bill several years ago that would have given standing to sue to distributors, and I assume that the Register would again support such a provision. It's not one that we are inclined to urge upon the committee, but if you believe that this is the only remedy that will seem to effectively deal with the problem of price discrimination, then it would be worth an experiment.

Mr. MOORHEAD. The Copyright Office supported enactment of the Satellite Home Viewer Act of 1988. Does our current negotiating position in the GATT oppose the enactment of similar legislation; that is, compulsory licenses with other countries?

Ms. SCHRADER. Not that I'm aware, especially not with respect to telecommunications matters. The Berne Convention itself, which

is what we are governed by now, allows a compulsory license with respect to retransmission of the broadcast signals.

The important requirement is that there must be compensation for that retransmission, but it can be done under a statutory license. I see no conflict, and I don't think there's any problem in our negotiations.

Mr. MOORHEAD. I have no further questions, Mr. Chairman.

Mr. HUGHES. The gentleman from New York is recognized for 5 minutes.

Mr. FISH. Thank you, Mr. Chairman.

Ms. Schrader, I join my colleagues in congratulating you and thanking you for being with us today.

When we enacted the Satellite Home Viewer Act of 1988, we thought the problem was clear. Because of the court decision, satellite carriers and dish owners were about to lose their signals. So, the Congress had to do something. But, I don't see the same urgency here with wireless cable.

Could you tell me, after 4 years of working on a proposed rule, what finally brought it to a head?

Ms. SCHRADER. It came to a head simply because we've been struggling with the policy issue for several years, and because we've been reviewing developments at the FCC. We thought that the FCC made some critical findings last fall, late in the year. Those findings were favorable to wireless cable from a communications regulatory policy viewpoint, but the findings were basically a very strong confirmation that they are not cable systems for communications law purposes. Of course, as I said, we recognize that the definition of cable system in the Copyright Act governs the cable compulsory license, and it is not exactly the same as the definition for communications law purposes. There is a close relationship, we suggest, and we think that that's clear from the legislative history of the 1976 act.

So, the FCC's decision and clear pronouncement that not a single wireless cable facility will be regulated as a cable system was significant to us.

Mr. FISH. Are you referring now to that part of your testimony on page 22 which starts the paragraph, "The compulsory license status . . . is not easy to determine," and you get into legislative history and commentators?

Ms. SCHRADER. Yes, although I—yes, that part.

Mr. FISH. Well, then look at the end of that paragraph. That's what I don't understand. There's a quote: "Nothing in the legislative history suggests that Congress intended an open-ended definition of the entities qualifying for the license. To the contrary, the compulsory license is hedged and qualified by strict limitations." Blank "FR" blank. What's that from?

Ms. SCHRADER. I'm sorry, Mr. Fish, that is from our own document which is being released today. It's available at the Federal Register today. We did not have the page citation since this statement had to be filed Monday before publication in the Federal Register. Our witness statement was filed with the subcommittee Monday, and the document is coming out in the Federal Register tomorrow. This is our conclusion.

Mr. FISH. That's your conclusion——

Ms. SCHRADER. Yes, that's our conclusion.

Mr. FISH [continuing]. Of the legislative intent of the Congress?

Ms. SCHRADER. Yes. As a preliminary matter, yes.

Mr. FISH. Now in 1976 this subcommittee may not have envisioned wireless cable or even satellite retransmission. However, I think we did intend to draft the 1976 act in such a way that we would not have to revisit it with every new development in technology. For copyright purposes, what distinguishes wireless cable from regular cable?

Ms. SCHRADER. That it is not subject to the rules and regulations of the FCC and never has been; that it primarily distributes its signal by microwave, whereas the history, we think, of the 1976 act emphasizes that cable systems were wired systems.

Mr. FISH. That's all the questions I have, Mr. Chairman.

Mr. HUGHES. Thank you. I just have a couple other questions.

As I understand it, the FCC has not yet made a decision as to how to deal with the finding of discrimination?

Ms. SCHRADER. Yes, I believe individual complaints will be examined by the FCC.

Mr. HUGHES. It's possible that they could find relief for the distributors from the standpoint of their common carrier status, among other things?

Ms. SCHRADER. Yes.

Mr. HUGHES. Let me just pick up also a couple of things which developed in your colloquy with Mr. Boucher. I also find the preliminary conclusion of the Copyright Office a little strange in its reading of what we mean by "or other communication channel." Frankly, I have some concerns about reading into that language, in essence, an "and" that's not there by suggesting that what was meant by the Congress—and I'm not so sure the Congress even contemplated the issue, but what was meant was that it was microwave transmission in addition to cable. I find that a strange reading of the statute. I would hope that the Copyright Office will revisit that issue.

What would be the downside of reading it the other way? I realize it raises some questions about the 1988 act and whether or not that was essential, but because of some court decisions to come down, the Congress, perhaps rightly, concluded it was time to develop a satellite home viewing act to make it very clear that we wanted to bring that within the regulatory process. But, what would be the downside of reading that language "or other communication channel" to be broad enough to include microwave transmissions? What's the downside?

Ms. SCHRADER. The downside would be that if wireless cable can be considered a cable system, then essentially it means that any video programming service that distributes programming to subscribers will qualify for the cable compulsory license. As you've said, I think satellite carriers would have qualified under that interpretation. I suggested that direct broadcasting entities, when they are fully operational, would qualify. It's a question of whether Congress wants us to proceed in that direction without looking at the policy implication, and perhaps, above all, reforming the cable compulsory license.

Let me say, Mr. Boucher said he didn't particularly want me to respond to his general comment, and I didn't respond then. But I do want to assure the subcommittee that the Office is not today taking any position in opposition to a statutory license for wireless cable. That's not our position.

It might well be that the cable compulsory license should be reformed, should be clarified in some of the respects that I mentioned, to change the royalty formula to a per-subscriber basis instead of continuing this really very anomalous legislative policy of distant versus local signals.

That would be one other possibility—to reform the cable compulsory license, or, of course, a third possibility, to create another statutory license for MMDS, since they are not in fact regulated as cable systems under the rules and regulations of the FCC. There are certain regulations regarding duplication of network signals, and syndicated sports programming. Those FCC rules will not apply to MMDS.

Mr. HUGHES. So, you're suggesting that in a "post-must carry" world we should reexamine the relationship between local and distant signals. That relationship, in essence is what——

Ms. SCHRADER. Yes.

Mr. HUGHES [continuing]. Is the bottom line.

Ms. SCHRADER. Yes.

Mr. HUGHES. I wonder if we could not do that and at the same time attempt to accommodate what has been a very difficult decision with regard to microwave. I grant you it's a very difficult decision. As a matter of public policy, what would be the harm in so interpreting "or other communication channel" to include microwave, aside from the prospect that other delivery systems—video delivery and transmission—would be included in that broad definition? As a matter of public policy, what harm would that create?

Ms. SCHRADER. As a matter of public policy, we don't have any problem with it. It would, from our point of view, be preferable to have an amendment that specifically says MMDS shall be treated as a cable system.

Mr. HUGHES. I see. But, when we do that, then we'll see other systems develop, and then we'd have to add additional language. The next would be "MPDPY" or some other system——

[Laughter.]

Ms. SCHRADER. Well——

Mr. HUGHES [continuing]. That 5 years from now will be on the market, and we'd be amending the law once again. Why not just do as I believe the Congress probably intended? I happen to—I sense that my colleague from California, Mr. Moorhead, and my colleague from Virginia, and I all share the same opinion: that that's probably what was intended, that it be interpreted broadly to include such things as microwave and not have to go back every time a new technology has been developed and amend the statute to include that specific technology.

Ms. SCHRADER. The Office certainly will be reconsidering its proposal.

[Laughter.]

Ms. SCHRADER. We put it out comment within for 60 days, and another 30 days of reply comments. We'll be getting all sorts of

public comments, and we'll certainly consider those and your comments as well.

Mr. HUGHES. Well, we appreciate that. I know it's been a very difficult decision for you. I know that's why it's taken so long to arrive at this point in the life of MMDS's, but we're happy we're there and we'd be very happy to work with you at this point in attempting to fashion the best possible response under the statute.

The gentleman from Virginia.

Mr. BOUCHER. Mr. Chairman, I just have one brief additional statement to make. Ms. Schrader, maybe we can help facilitate your process of reconsideration by helping to draw a distinction between the satellite-transmitted signals on the one hand and the signals that are merely delivered locally, whether by wires, cables, or other forms of communication, on the other.

The suggestion has been made that if you were to interpret anything beyond wires and cables to be a cable system, then the Home Satellite Viewer Act of 1988 would not have been necessary, because that was a congressional recognition that there were some gaps in the compulsory license, particularly with regard to satellite transmission.

I would suggest that there was a problem with satellite transmissions not present with local transmissions. They really don't fit the precise definition of cable systems as contained in the compulsory license enactment itself, because that says a cable system is a facility located in a State, territory, trust, or possession. And, in fact, the satellite transmissions rely on facilities that in large part are contained in a geosynchronous orbit above the earth, clearly not in a State, territory, or possession.

So, I think it would have been something of a leap for you to have extended the cable compulsory license to satellite transmissions in view of that fact. We obviously don't have that problem with MMDS or other successor technologies that may come along that are purely locally based within a given community. Those are other forms of communications within the meaning of the act. I would just encourage that reconsideration, and I hope that explanation helps you.

Ms. SCHRADER. Thank you.

Mr. HUGHES. The gentleman is probably correct, except that it was enacted by the Congress, and most of my constituents believe we're in outerspace most of the time.

[Laughter.]

Mr. HUGHES. I thank you, Ms. Schrader, and your staff, for an excellent presentation and your assistance. As usual, you've been very helpful to us.

Ms. SCHRADER. Thank you.

Mr. HUGHES. Thank you very much.

Now the subcommittee will hear from a panel of witnesses, all of whom represent interests with a stake in the delivery of copyrighted signals to the American household. The witnesses are all experts in the Satellite Home Viewer Act and cable television compulsory license.

First, we'll hear from Mr. Andy Paul, senior vice president, government affairs, for the Satellite Broadcasting and Communications Association of America. Mr. Paul has devoted almost 25 years

to the telecommunications industry. He previously worked as the director of governmental relations for Paramount Communications, Inc.

Second, the subcommittee will receive testimony from Mr. Bob Phillips, the chief executive officer of the National Rural Telecommunications Cooperative Association. Under the leadership of Mr. Phillips, NRTC has grown into an organization that now serves nearly 60,000 rural homes with satellite dish programming.

Third, we'll hear from Mr. Preston Padden, senior vice president of the Fox Broadcasting Co. Mr. Padden is responsible for managing the distribution of Fox programming and represents the company in legislative and regulatory affairs. He previously was president of the Association of Independent Television Stations, Inc.

Fourth, a statement will be presented by Mr. Jeffrey Treeman, senior vice president and chief operating officer of United Video, Inc. United Video is a company located in Tulsa, OK, that sells and delivers superstation signals to multichannel businesses.

Last, and certainly not least, testimony will be received from Mr. Robert L. Schmidt, president of the Wireless Cable Association. Previously, Mr. Schmidt was president of the National Cable Television Association.

There's a great deal of talent arrayed at the witness table today. We have each of your statements, which, without objection, will all be made a part of the record in full. We hope you can summarize for us, so we can get right to the questions. Please don't read your statements for us. We've read them, and we want to get right to the questions.

First, let's begin with you, Mr. Paul. Welcome.

STATEMENT OF ANDREW R. PAUL, SENIOR VICE PRESIDENT, GOVERNMENT AFFAIRS, SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA, ALEXANDRIA, VA

Mr. PAUL. Thank you, Mr. Chairman and members of the subcommittee.

We think that this hearing is being conducted at a very propitious time because there are a number of factors which have come into play affecting licensing in general which deserve the attention of this subcommittee, among them retransmission consent. So, we commend you, first of all, for calling this hearing as you have, and I also appreciate the opportunity to speak before you today.

In the last 15 years since the 1976 Copyright Act was enacted—and this subcommittee has been the father of the copyright legislation and these licenses that we're discussing today—the subcommittee has crafted a very effective structure of relationships between copyright owners and creators and the creative community, on the one hand, and the people who market and distribute those products, on the other hand. So, as you consider an issue like retransmission consent, for example, and even the existence of the satellite statutory license itself, we would urge you to keep in mind how well and how finely tuned this structure of relationships has been and how effective it has been, particularly in terms of making available to hundreds of thousands of households that use satellite

receiving equipment as their means of receiving entertainment, sports programming, and so forth—how effective the system that you've created has been in letting this all happen. We would urge that, whatever you decide or whatever deliberations you make, nothing be done that would seriously disrupt the availability of this programming to those people out there who rely on it as they do.

I would say also that in this context, the fact that the satellite license has been very effective, we would urge you to look at it thoroughly before 1994, when it is due to expire, and to seriously consider extending it beyond that time for the many benefits that it has provided the up to nearly 3.5 million satellite households that are in the United States today.

With regard to retransmission consent, there are several factors relating to it that have very grave implications for the satellite license. I will name three.

In the first place, it has been posited by the broadcasters who proposed it in Senate bill S. 12 and who are now urging it to be part of H.R. 1303 that this is purely a matter or an issue of local carriage and "must carry," if you will, in their search for another revenue stream as their local affiliate programming is being carried on cable systems.

Using the shroud of its being a local carriage issue, though, they have managed to sweep the satellite industry into their plan. I think, as Ms. Schrader pointed out very adequately, there are no local carriage or "must carry" issues in the satellite industry. A satellite signal has a national footprint. Satellite carriers do not uplink local signals for the purpose of retransmitting them back into the same market from which they were uplinked. So they are not local signals from that point of view. In terms of the "must carry" issue, retransmission consent is not germane.

However, once the license has expired in 1995, it can present a very serious situation which has the potential of disrupting a lot of satellite home viewing and the availability of the popular broadcast programming which satellite households now enjoy. Beginning January 1, 1995, when the license expires and the retransmission consent scheme takes effect, a satellite carrier, in order to carry a broadcast signal, will have to conduct two sets of negotiations for two different sets of compensation under two different statutes of the law for each and every broadcast signal that it wants to carry. We don't think that is a public policy which, on the one hand, encourages diversity and quality of programming, which is the communications policy of this country, while, on the other hand, it creates some severe administrative obstacles, at a minimum, to facilitating the delivery of that programming to the public.

So, there is a very serious question raised as to what the effect of retransmission consent is going to be on the ability of these carriers to gain access to programming. In the first place, under the Communications Act, they would have to go to a broadcast station and get the consent of that station to be carried for whatever compensation it would be. They would then have to go to the copyright owners to fulfill the copyright liability that they would have in carrying the programming and negotiate with them for whatever compensation would be involved to carry the programming.

Now if either one of those parties, in the absence of a license of any type, if either one of those parties decided they didn't want to negotiate or that the fees that they decide on were extraordinary, to say the least, either subscription costs to home satellite owners would be driven up substantially or, worse, the programs simply wouldn't be available. I must say that broadcast programming, both independent superstations and the network programming that's delivered to the "white areas," is a very important staple, a viewing staple in satellite households today.

The third issue, which was not raised concerning retransmission consent, is the fact that carriage of these signals is frozen as of May 1, 1991. So, if you are either an existing satellite system that wants to carry a superstation but does not carry it today or you are a DBS Ku-band system that plans to go up in the next year or two, at least while the license is still in effect, you will have to get consent to carry whatever broadcast stations you want to carry immediately. So, it is not simply a 1995 issue. It's an issue today if you want to carry new programming and you are a service provider.

Let me turn now to the issue of price discrimination, which was also raised. Our association has always taken the position that the delivery of broadcast signals to the home satellite dish market should not be subject to price discrimination provisions in legislation. One of the reasons has been that up until now it was always believed that the appropriate language existed in the 1988 act that would offer remedies to someone who may have been aggrieved. Certainly if that's not the case, then that section should be changed so distributors such as Mr. Phillips, who has made a private complaint to the FCC, should have standing in a situation like that.

But, apart from that, we have always looked at the satellite market as a different market from the cable market, and it is different. It is substantially smaller than the cable market. Signals are not sold into that market on the basis of large amounts of subscribers, enormous volumes of subscribers that are available when the same signal is sold to a cable system. So, the expense requirements of distributing it in the satellite marketplace and certainly the income requirements are a lot different. So, in fact, up until as late as 2 weeks ago, our board of directors again reiterated our position: that we do not favor subjecting these broadcast signals to any price discrimination restrictions in the cable legislation itself that's been considered.

Beyond that, I will say one word with regard to the "white area" situation. There is some misconception that a "white area" is by necessity a geographic region, and it's not. When you read the act, a "white area" is described as an unserved household, which is a household which cannot receive a viewable, off-the-air network signal in accordance with a particular grade B intensity which has been specified by the Federal Communications Commission, and neither can that household have subscribed in the 90 days previous to that time to a cable service. That is what is called today a "white area."

The carriers who belong to our organization are quite diligent in screening the persons who apply for network affiliate service. If you will look in the testimony, you will see that in, I believe, one of the appendices, that in those instances where there is a question, when

a viewer is questioned by the network affiliate as to whether or not it is really in a "white area," that viewer—in fact, all viewers who are in that status and whose eligibility is questioned—they are sent a letter and an affidavit by the carrier, which is in the appendix. They are asked to sign that affidavit affirming that, yes, indeed, they do not receive a viewable signal in accordance with the 1988 act. Any viewer who receives the affidavit, but does not return it, his or her service is terminated.

That summarizes what I have to say, and I'll be happy to answer questions.

Mr. HUGHES. Thank you.

[The prepared statement of Mr. Paul follows:]

Testimony of
Andrew R. Paul
Senior Vice President
Satellite Broadcasting and
Communications Association of America
Before the
Subcommittee on Intellectual Property
and Judicial Administration
House Committee on the Judiciary

July 10, 1991

Mr. Chairman and members of the Subcommittee, I am Andrew Paul, Senior Vice President of the Satellite Broadcasting and Communications Association. I appreciate very much the opportunity to discuss with you today how the satellite industry is faring under the statutory license created by the Satellite Home Viewers Act of 1988 - legislation which this Subcommittee played such an important part in creating. The hearing today is particularly timely because the negotiations to determine the satellite statutory license fee for 1993-1994 have been initiated just this month. The success of the parties in coming to a fair and equitable agreement will be an important indication as to how effective legislatively mandated fee negotiations are in a program distribution environment, and whether or not the parties will resort to compulsory arbitration in order to resolve their differences. Today's hearing is also appropriate in view of the "retransmission consent" proposal which the networks have been urging on the Congress and which would have grave

implications for the satellite license as well as the industry. In the context of all the factors affecting the satellite industry which we will discuss today, we would urge the Congress to review carefully the benefits which the license has conferred on the satellite viewing public and to consider seriously extending the license beyond its 1994 expiration date.

The Satellite Home Viewers Act is a principal milestone in the history of our industry. Its necessity became imminent in 1986 when Home Box Office began to encrypt its satellite signal. Since then, virtually every major basic and premium service has followed suit, changing the face of the satellite industry. The significance of the Act lies in the creation of the satellite statutory license. It is a direct result of two factors: the encryption of superstation signals distributed by satellite carriers to TVRO households and the necessity to ensure that rural households had access to network programming. Coincidentally, the Act was passed at the same time that the first of the networks began to encrypt its satellite delivered signal.

A lesser known component of the 1988 Act, but equally important in its own right, is its amendment of the Communications Act with regard to satellite signal theft. At the present time, the elimination of signal piracy is

one of the most pressing priorities of the satellite industry. Notwithstanding the public's ready acceptance of satellite receiving technology up to now, piracy has held the industry back from more rapid development. Piracy dissuades programmers from investing in satellite broadcasting and augments the costs of those who do. While the Act has provided the satellite industry with enforcement "teeth" by prohibiting the modification or trade in devices, or so-called "black boxes," which are used to decrypt unlawfully satellite programming, the industry remains concerned over the effects of piracy.

Today our industry maintains an extensive anti-piracy effort which utilizes these provisions of the Act to prosecute the large numbers of illegal businesses which make available to satellite consumers illegal decryption devices in contravention of the Act. Recently, we have experienced significant success in our fight against piracy, and we anticipate even greater gains next year when the data stream for the current satellite encryption technology (VCII) will be turned off and replaced with a more secure means of transmission. This event is intended to disable completely existing pirate technology.

The penetration of satellite technology to television viewing households has been dramatic. In 1980, approximately 5,000 systems were in place. Eleven years

later, we are approaching 3.5 million systems, with approximately one million being added to the consumer base every three years. In this regard, the license established by the 1988 Act has permitted the satellite industry to take its rightful place as a high quality, video program provider. The license, among other factors, is giving satellite broadcasters the opportunity to offer popular broadcast programming, in addition to basic cable services, to TVRO households. In short, it is a primary basis for the industry's ability to compete in the video market place.

A major factor in the creation of the license was the overwhelming demand for broadcast programming by TVRO households. With the advent of encryption, the license became necessary in order to grant carriers the right to distribute the programming. The acceptance of broadcast programming in the market place is a clear indication of viewers' desire to acquire news, entertainment and sports from a variety of sources, thus helping to fulfill a major goal of U.S. communications policy.

Independent superstation delivery to the TVRO market was originally undertaken by the three carriers which also served the cable market. Today there are five carriers which, as a group, serve approximately 2 million TVRO superstation subscriptions in approximately 600,000

households. (A listing of broadcast stations carried under the license and their respective carriers is contained in Appendix A.) Superstations are available to all TVRO consumers (compared to network signals which are restricted by the Act to satellite delivery to "white areas"). Superstations have become a basic viewing staple of the satellite industry because of the variety and quality of their programming, including sports not otherwise available. Their popularity is evident not only from subscription levels, but also from the number of program distributors which compete to sell superstation programming to TVRO homes.

The fact that six of the signals directed to the TVRO market are network affiliate stations (in addition to a public broadcast signal) reinforces the beneficial effect the license has had for satellite consumers. The two carriers which distribute these signals have a total of approximately 300,000 subscribers, limited to so-called "white areas" under the terms of the 1988 Act. A "white area" or "unserved household," as it is defined in the Act, is a household that "cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network...." (Sec. 119[d][10][A]). Thus while the license has now enabled a

substantial number of previously unserved households to receive network affiliate programming, there may be up to 3 million more households which remain unserved. They would comprise a significant new audience for the networks, as well as for the satellite industry, as that potential viewing group continues to be penetrated by satellite marketing efforts. Again it is through the license that these heretofore unserved households would have the opportunity to obtain network programming.

An examination of the filings made by the carriers with the U.S. Copyright Office under the Act reveals that subscribership to both superstation and network signals has been growing steadily. This is a clear indication of the popularity of broadcast programming among TVRO consumers and the success of the satellite statutory license in helping to build a market served by an emerging technology.

As I mentioned at the beginning of this testimony, the license fee negotiations for the period 1993-1994 have been initiated between the satellite industry and the copyright owners. The current copyright rates as specified in the Act are 12 cents/month/subscriber for superstations and 3 cents/month/subscriber for network signals through 1992. These fees were adopted because they were commensurate with the rates that the cable industry was paying into the copyright pool at the time the legislation was enacted.

Since then, however, new factors affecting the cable fee have impacted the rate level: the surcharge for syndicated exclusivity has been eliminated; and the cable industry recently concluded negotiations with the copyright owners for an inflationary adjustment of the fee, leaving it unchanged at 12 cents. In accordance with section 119(c)(3)(D) of the Act, these factors should be taken into consideration when the rate is determined.

If, at the end of the negotiating period with the copyright owners (December 31, 1991), no agreement has been reached between the parties, then the matter is submitted to compulsory arbitration in accordance with the Act. Our industry is entering into the negotiations with every intention to reach an agreement that is fair to both sides. While the copyright pool in question is quite small - some $3 million - in comparison to the cable pool of slightly over $160 million, these rates are extremely important to the carriers.

It is our intention to pass on to the Subcommittee our industry's reflections and observations as the negotiations progress. We believe it would also be appropriate for the Subcommittee to begin a review of the effect of the satellite license not only as it enables the delivery of broadcast programming to TVRO subscribers, but also as how it encourages the development of communications policy by

fostering competition in the video market place. It is our view that an extension of the license beyond 1994 would well serve both our communications policy and the satellite viewing public.

I would like to turn now to the "retransmission consent" proposal which the networks have advanced in the cable legislation currently being considered in the Senate and which was the recently the subject of a lively hearing in the House Subcommittee on Telecommunications. The views of the satellite industry on the networks' scheme are well known. We are adamantly opposed to it.

In the first place, "retransmission consent" revolves around the issue of "must carry" or local carriage of broadcast signals by cable systems which enjoy a virtually free, local compulsory license. But there is no local carriage issue in the satellite industry. Satellite service is national in scope, and "must carry" and local carriage issues are simply not germane. It is evident that the networks are attempting to sweep satellite into their consent scheme under the guise of resolving local carriage as it relates to cable.

If "retransmission consent" is enacted as the networks have envisioned it, then, in 1995 when the statutory license has expired, satellite carriers would be subject to

two negotiations under two separate statutes - the Communications Act for retransmission consent to carry a broadcast signal and the Copyright Act for program copyright clearance - for each and every broadcast signal they proposed to distribute to the TVRO market.

The repercussions of such a scheme should be clear. First, the process of acquiring consent and copyright would be so burdensome that, as a public policy matter, it would be more of a hindrance than an efficient mechanism for allowing the distribution of programming to the public. Just the cost of conducting a twofold negotiation would be an unfair burden on the satellite industry and its subscribers. Second, and even more important, a refusal to negotiate, or a demand for an unreasonable fee, by one of the parties would result in a loss of presently available programming to the public - an event we do not believe would serve the purposes of communications policy. Making broadcast programming available to TVRO is one of the functions of the statutory license, and depriving viewers of popular broadcast signals would be totally contrary to the very goal for which the license was established. Finally, because of the leverage of both the broadcasters and program owners, it would result in increased costs to carriers and inevitably to the TVRO consumer. The TVRO industry would be seriously disadvantaged under such a scenario.

Furthermore, the existing "retransmission consent" proposal would require broadcaster consent for any signal not already carried on May 1, 1991. This requirement is clearly aimed at stifling competition. Existing C-band services would be prohibited from acquiring new programming for consumers, and the newer DBS Ku-band systems would be stillborn. Thus it is plain that the network plan has a direct impact on the operation of the license, and on the ability of carriers to acquire programming after the license has expired.

We therefore urge the Congress to be extremely cautious in its approach to such a radical change in the relationship between the programmers and broadcasters, and the satellite carriers and distributors. The existing copyright structure for video distribution, whether by cable or satellite, has been carefully nurtured in the 15 years since the 1976 Copyright Act became law. Any changes should be considered carefully so as not to disrupt the market place and ultimately deprive the consumer of the quality television programming which it has a right to view.

A major connection between "retransmission consent" and the satellite industry is the networks' concern of limiting their broadcast signals to unserved households. These

concerns are being met by the process the carriers employ to distribute network affiliate signals. Both of the carriers which distribute network signals diligently strive to ensure that their subscribers are eligible to receive network programming. They provide a list of new subscribers to the networks which then review the lists ostensibly with their local affiliates. If it appears from the addresses that certain subscribers are located so as to be able to receive viewable off-air signals, the networks then question those households' eligibility with the respective carrier. The carriers then request subscribers in question to complete an affidavit affirming that a viewable off-air signal can not be received at their location and that they did not subscribe to cable service in the previous 90 days. The service of those who do not complete the affidavit is terminated. (Sample letter and affidavit is attached as Appendix B.)

The carriers also take other steps to ensure compliance with "white area" restrictions. Their advertising and sales material contain appropriate conditions of subscriber eligibility. Sales representatives are specifically trained to observe the screening guidelines, and their performance is frequently monitored. The efforts of the carriers in this regard are commendable and effective.

Moreover, the Act contains remedies for the violation of the restrictions on retransmissions to "white areas." Section 119(a)(5) has a full panoply of remedies in order to pursue infringements. The networks could further file a complaint with the Copyright Royalty Tribunal. No further legislative assistance is warranted.

Another issue relative to the 1988 Act revolves around the recent report to Congress by the Federal Communications Commission on the question of price discrimination in the marketing of services to distributors. Controversy over this matter has risen to the point where cable legislation in both houses of Congress contains provisions requiring carriers not to discriminate in prices, terms or conditions in the sale of programming to satellite distributors. Further, a major program distributor has filed a private complaint at the FCC against three satellite carriers alleging price discrimination.

The SBCA as an industry organization just recently reiterated its position in favor of exempting broadcast programming from access and price restrictions. Satellite is a different market from cable. It is far smaller and has significantly different distribution expenses and income requirements. Differences in price do not always mean discrimination is present. Marketing requirements are

far more entrepreneurial for satellite than they are in distributing to cable systems. As a result, many of our members fear the loss of superstation programming if prices - which currently are on an "open market" basis - are forced to be commensurate with those charged to cable systems. The SBCA, however, would be concerned if it were proved that price discrimination existed. Our organization has always been committed to eradicating discrimination from the market place and continues to do so.

The 1988 Act contains specific remedies (Sec. 119[a][6]) in cases of discrimination by a satellite carrier against a distributor. Claims have been made that distributors may not have standing under the Act to bring a complaint. If that is determined to be so by the FCC or the courts, then the SBCA would strongly urge that the Act be changed to insure that an aggrieved party who has been harmed has proper recourse. But we do not believe that, where adequate remedies exist, additional legislation need be enacted simply to regulate market place transactions. Moreover, under the Act any person is free to avail himself of the terms of the statutory license by retransmitting and distributing programming directly if, in fact, excessive rates are being charged.

This, Mr. Chairman, concludes the SBCA's testimony. It has been a pleasure to present to you the views of the

satellite broadcasting industry on the effect of the statutory license on today's market place. I would be pleased to respond to your questions.

APPENDIX A

Satellite Broadcasting and Communications Association of America

SATELLITE TV Facts At A Glance

- **3.4 million home satellite dish owners.**
- **Over 75 unscrambled services available to dish owners.**
- **Approximately 75 audio program services available.**
- **82 subscription services available.**

Satellite TV delivers a greater variety of programming than any other home entertainment medium. Plus, the Satellite TV consumer gets the best possible audio and video at reasonable rates! Take a look at what is available now on Satellite TV.

- ☆ Action (PPV)
- ☆ All News Channel
- ☆ American Movie Classics
- ☆ BRAVO
- ☆ Cable Video Store (PPV)
- ☆ The Family Channel
- ☆ Cinemax
- ☆ CNN
- ☆ CTV: The Comedy Network
- ☆ Discovery Channel
- ☆ The Disney Channel
- ☆ Eastern Microwave
  - — WSBK Boston (Ind)
  - — WWOR Secaucus, NJ (Ind)
- ☆ ENCORE
- ☆ ESPN
- ☆ Home Box Office
- ☆ Headline News
- ☆ Lifetime
- ☆ MTV
- ☆ Nashville Network

- Netlink
  - KUSA Denver (ABC)
  - KCNC Denver (NBC)
  - KMGH Denver (CBS)
  - KRMA Denver (PBS)
  - KWGN Denver (Ind)
  - WGN Chicago (Ind)
- Nickelodeon
- Playboy At Night
- PrimeStar (Ku-Band)
  - WTBS
  - WGN
  - WWOR
  - KTLA
  - WSBK
  - KTVU
  - WPIX
  - Request TV (PPV)
  - Viewers Choice 1 (PPV)
  - Viewers Choice 2 (PPV)
  - Japan TV
- PrimeTime 24
  - WABC New York (ABC)
  - WBBM Chicago (CBS)
  - WXIA Atlanta (NBC)
- Satellite Sports Networks
  - PSN-Upper Midwest
  - Sunshine Network
  - Home Sports Entertainment
  - KBL Sports
  - Prime Ticket
  - Pacific Sports Network
  - P.A.S.S.
  - PSN - Rocky Mountain
  - PSN - Intermountain West
  - Prime Sports Northwest
  - PSN - Midwest
  - Home Team Sports
  - Prime Network
  - Madison Square Garden Network
  - Midwest Sports Channel
  - Sports South Network
- Showtime
- Spice (PPV)
- Superstar Connection
  - WGN Chicago (Ind)
  - WPIX New York (Ind)
  - KTLA Los Angeles (Ind)
  - KTVT Dallas/Fort Worth (Ind)
- The Movie Channel
- Turner Network Television (TNT)
- TVN (10 channel PPV)
- USA Network
- The Weather Channel
- TBS Superstation
- VH-1
- Viewers Choice 1 (PPV)
- Viewers Choice 2 (PPV)

FUTURE SERVICES

- The Asia Network (1991)
- Career Channel Network (1991)
- The Chiller Channel (Early 1991)
- Cowboy TV Network (1991)
- Courtroom TV Network (1991)
- The Food Channel (1991-92)
- The Global Channel (1991)
- Global Village Network (1991)
- The How-To-Channel (1991)
- Maximum Entertainment Network (3/91)
- Senior American Network (1/91)
- The Sci-Fi Channel (Fall 1991)
- Talk Television (1991)

SBCA Office	(703) 549-6990
SBCA Anti Piracy Hotline	(800) 533-4584
SBCA Industry Information Line	(800) 726-7222

BEST COPY AVAILABLE

SBCA SATELLITE SHIPMENT STATISTICS

Year	Shipments	Total Installed Base
1980	5,000	5,000
1981	33,500	38,500
1982	130,000	168,500
1983	290,000	458,500
1984	515,000	973,500
1985	735,000	1,708,500
1986	227,500	1,936,000
1987	268,500	2,204,500
1988	346,000	2,550,500
1989	352,000	2,902,500
1990	383,000	3,285,500

MONTHLY SHIPMENT FIGURES

	1988	1989	1990	1991
January	25,000	28,000	29,000	26,000
February	18,000	19,000	29,000	24,000
March	28,000	22,000	30,000	29,000
April	26,000	22,000	29,000	30,000
May	25,000	20,000	30,000	23,000
June	24,000	24,000	26,000	
July	28,000	28,000	26,000	
August	36,000	36,000	36,000	
September	41,000	38,000	38,000	
October	39,000	45,000	37,000	
November	32,000	38,000	36,000	
December	24,000	32,000	37,000	

Units shipped as of June 1, 1991: 132,000

1991 vs. 1990: - 15,000 systems

Total Units Shipped as of June 1, 1991 = 3,417,500

Estimated Number of Satellite Systems

January 1, 1991

Alabama	76,700	Montana	38,850
Alaska	5,000	Nebraska	40,800
Arizona	47,000	Nevada	29,800
Arkansas	52,500	New Jersey	20,000
California	325,000	New Hampshire	15,500
Colorado	47,250	New Mexico	21,700
Connecticut	11,000	New York	119,500
Delaware	6,500	North Dakota	14,900
District of Columbia	1,600	North Carolina	139,500
Florida	162,500	Ohio	110,000
Georgia	82,250	Oklahoma	56,700
Hawaii	1,100	Oregon	68,000
Idaho	27,200	Pennsylvania	90,700
Illinois	88,400	Rhode Island	3,600
Indiana	82,900	South Carolina	54,400
Iowa	51,800	South Dakota	16,500
Kansas	47,600	Tennessee	113,600
Kentucky	59,250	Texas	265,800
Louisiana	61,000	US Territories	10,400
Maine	17,800	Utah	20,400
Maryland	31,400	Vermont	19,500
Massachusetts	13,000	Virginia	75,000
Michigan	120,000	Washington	68,600
Minnesota	47,000	West Virginia	42,000
Mississippi	49,900	Wisconsin	58,300
Missouri	84,500	Wyoming	14,500

APPENDIX B

NETLINK

Dear

It has been brought to our attention by the affiliate in your area,

that you should be able to receive an acceptable signal from your local station using a conventional roof top antenna at your current address. If this is in fact true, and you are able to receive your local signal clearly using a roof top antenna or through cable service to which you subscribed within 90 days of your subscription to Netlink, then by law (The Satellite Home Viewer's Act of 1988) you are not eligible to receive . Netlink's Denver signal, via satellite.

If you feel that the information provided to Netlink by the affiliate listed above is incorrect and you are not able to receive their local signal clearly, it is imperative that you take the time to fill out the affidavit on the reverse side of this letter. The affidavit must be filled out completely, signed and returned to Netlink within 15 days from the date of this letter.

We appreciate your cooperation in complying with the Satellite Home Viewer's Act of 1988 and look forward to providing you with the best possible service.

Esta Clemons
Network Compliance

Enclosure

AFFIDAVIT CARD

1. I did not have a subscription to cable television in this household within 90 days prior to my subscription to Netlink.

2. I do not receive an acceptable over-the-air signal with a typical rooftop antenna. (An acceptable signal is one without "ghosting", "snow" or other objectionable interference).

   (a) The specific reception problem is as follows:

   _____

   _____

   (b) I believe the problem is caused by:

   _____

   _____

3. I do / do not use my satellite dish solely for private home television viewing.

4. I represent that the above statements are true and correct.

_____ _____
Signature Date

_____ _____
Printed Name Account #

_____
Home Address (Street) (City) (State) (Zip)

( ) _____ _____
Telephone Number Date of Subscription to Netlink

IMPORTANT:

_____
Print precise description of dish location (e.g. 2 miles north of Hwy. 2 on Elk Creek Road)

APPENDIX C

MEMORANDUM

The Great "Retransmission Consent" Debate

This white paper describes how "retransmission consent" would negatively affect satellite carriage of superstation and network programming to TVRO viewers. To summarize, if "retransmission consent" is enacted into law, satellite carriers will have to conduct two negotiations under two separate statutes - the Communications Act and the Copyright Act - for each broadcast signal carried. Furthermore, "retransmission consent" would enable broadcasters to stifle competition from C-band as well as new K-band DBS technologies by withholding carriage consent, even though these services may have already obtained copyright clearance.

A. **Existing "Retransmission Consent" Law:** Section 325(a) of the Communications Act of 1934 contains the "retransmission consent" powers available today to broadcast stations. It states that,

> ". . .nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station." (June 19, 1934, c.652, Title III, Sec. 325, 48 Stat. 1091.)

For the most part, this section has been used to authorize the use of translators by originating broadcast stations. It does <u>not</u> apply to satellite carriers because they are not "broadcasting stations" in this context just as today it does not apply to cable.

B. **The Networks' Proposal:** recognizing that their consent authority is limited to other "broadcasting stations," the networks were successful during the mark-up of S.12 in expanding their Section 325 powers. The "retransmission consent" amendment creates a new subsection (b) which states,

> ". . . no cable system or <u>other multichannel video programming distributor</u> (emphasis ours) shall retransmit the signal of a broadcasting station. . . without the express authority of the originating station. . . ."

Through this new language, the broadcasters have successfully gained new consent powers over cable, ostensibly to resolve the issue of local carriage and cable's compulsory license. **But satellite has also been swept into the "retransmission consent" plan even though there is no local carriage issue germane to satellite broadcasting.**

C. **The Satellite Home Viewer Act of 1988:** Section 111(a)(3) of the Copyright Act of 1976 provides an exemption from copyright liability for "passive carriers" which retransmit broadcast signals to cable systems because they have no "direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission." Carrier activities must consist only of "providing wires, cables, or other communications channels for the use of others."

But the court held in Pacific & Southern Co. v. Satellite Broadcast Network, Inc. in 1988 that SBN's satellite delivery of broadcast signals to TVRO viewers was not free from copyright liability (as it would be for cable use where the carrier would enjoy "passive carrier" status under 111 [a][3]). So Congress enacted the SHVA which grants a copyright license for the distribution of broadcast signals by satellite carriers to TVRO households. The SHVA sunsets at the end of 1994 when it is contemplated that the carriers would negotiate privately with the copyright owners for the right to distribute programming.

D. **Scenario #1: It's 1995 and There Has Been No Change in "Retransmission Consent" Authority for Broadcasters:** in order to carry and distribute superstation and network programming to TVRO viewers, satellite carriers will have to conduct one, and only one, negotiation: with the copyright owners for distribution rights to programming. No "retransmission consent" is necessary because broadcasters are not so empowered by existing Section 325(a) of the Communications Act.

E. **Scenario #2: It's 1995 and "Retransmission Consent" is the Law of the Land:** should "retransmission consent" be embodied in the Communications Act as proposed in S.12, the satellite broadcasting industry would have to undertake two separate negotiations under different statutes, but both for the same signal. First, because the statutory license under the SHVA will have already expired (on December 31, 1994), the satellite industry would no longer have the "compulsory" or "program access" protection which the license conferred. Therefore, in order to obtain distribution rights to programming, a satellite carrier

would still be required to negotiate with copyright owners. The carrier would also be required to obtain "retransmission consent" from the broadcast station in accordance with the new law.

Furthermore, the broadcasters "retransmission consent" proposal provides that only broadcast signals carried by satellite on May 1, 1991, are exempt from the consent requirements until January 1, 1995. This provision is particularly troublesome because new Ku-band Direct Broadcast Satellite services which come on line after May 1 could be precluded right away from carrying popular superstation and network programming (even though the satellite statutory license would still be in effect). Denying DBS from obtaining these signals would defeat the intent of the Congress in stimulating the development of alternate video technologies.

F. **Conclusion:** it is clear that the satellite industry would be in a perilous position if "retransmission consent" is applied to satellite carriage. In the context of resolving the local "must-carry" issue for network affiliates, it has no application to satellite broadcasting which airs programming on a national, not local, basis. If "retransmission consent" were to be applied to satellite in the absence of a statutory copyright license such as that embodied in the SHVA, then satellite home viewing of broadcast programming would be vulnerable to uncertainty in the market place which could dictate in the end what programming might or might not be available to TVRO households.

Simply put, competition from satellite services could be severely jeopardized if broadcasters or copyright owners elected to withhold their programming. Exclusion from "retransmission consent" and extension of the satellite license would insure that the satellite industry retain its competitiveness in the video market place.

June 25, 1991

Mr. HUGHES. We'll call Mr. Phillips. Welcome.

STATEMENT OF BOB PHILLIPS, CHIEF EXECUTIVE OFFICER, NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE, HERNDON, VA

Mr. PHILLIPS. Thank you very much, Mr. Chairman and members of the committee. I, too, am pleased that you're holding today's hearing, and I appreciate the opportunity to appear before you. I'm here representing the National Rural Telecommunications Cooperative. NRTC is a national organization. It was formed in 1986. We consist of 572 rural electric and rural telephone systems who are delivering the rural TV programming package to almost 60,000 home viewers who have home satellite dishes.

We have been providing a programming package which includes network and superstation programming under the license, and we do appreciate the importance of this license. We believe it's essential today in providing this service and making the home dish market a success.

However, I'm here today to talk to you about an anomaly in the present act. During consideration of the act, the committee did receive evidence about pricing discrimination against satellite distributors by satellite carriers. As a result, there were two provisions in the original act. One required that the Commission, the FCC, conduct an inquiry into the existence of satellite carrier discrimination and report back to Congress. The second provision was a condition on the compulsory license that satellite carriers not engage in unlawful discrimination.

We participated in the FCC inquiry, which took 2 years, and we provided examples of our discrimination problems in that instance. On May 9, the Commission issued a report, and I will just quote to you what it said, "based upon the record compiled, and even giving satellite carriers whose practices have been challenged the benefit of all appropriate inferences, some satellite carriers are charging unjustifiably higher rates to some distributors than to some cable operators for superstation and network station programming."

I'd also like to offer just a couple of examples that are in the report. They said in one case a satellite carrier was charging a cable distributor 10 cents for a signal. That same signal, when delivered to a satellite distributor, was being charged at the rate of 75 cents. In addition to that, the Commission said, if we look at this on a cost-of-service basis, that generally many distributors are paying 30 to 80 cents per customer per station per month more than what the carrier has even represented their cost of service to be.

Mr. Paul has just suggested to you that our market is different because it's smaller. I would like to offer to the committee that it's smaller because the rates that have been charged to consumers are too high. They can't afford them. It has led to piracy. Today we have 3 million dishes installed but only 715,000 subscribers are paying anyone for programming.

The other personal experience I'd like to add is that when we go to the contract table with the program providers—in this case, the satellite carriers—they've also engaged in unreasonable contract terms, like requiring us to agree to noncompete clauses so that we,

ourselves, can't become satellite carriers and uplink signals in competition if we're going to be allowed to receive signals from them.

As a result of these activities, we did file formal complaints at the FCC, and these are in the discovery phase. I wanted to add that all three of the satellite carriers who are in these proceedings, including United Video represented here today, have claimed to the FCC that it has no jurisdiction to act against them either, because they are private carriers for purposes of the Communications Act and not subject to the antidiscrimination provisions in the communications law.

So, we turn, then, to the copyright remedy. As the Commission reported in its statement, there is an act of infringement. We have talked with the Copyright Office and with the copyright holders. As Ms. Schrader said, there is no standing for a distributor to bring action, and the copyright holders have no interest in bringing an action against the discrimination because of their general distaste for the copyright law and the scheme that it presents.

So, as you can see, we think we've established a wrong under this act, but we find no remedy to redress it. This discrimination, I would close by saying, is a very serious matter. It's been ongoing for 5 years. Over this period, our rural satellite subscribers have paid many times more than the cable customers pay for the same programs, and, in fact, we have been charged millions of dollars more than what we believe to be fair rates.

Ms. Schrader said that in total the royalties collected have been $5.5 million. I would suggest that we strongly feel that satellite carriers have extracted more than $5.5 million in windfall profits over and above what it costs them to serve including a fair return from the satellite dish consumers. This is a small base of consumers, again only 715,000.

So, we're asking the committee to stop this unfair practice which really undermines the goal of the Copyright Act to extend these services to rural consumers who live beyond the reach of cable or off-air signals. We believe that it is necessary, and we're requesting that this committee adopt an amendment which will clearly allow distributors to bring action against satellite carriers for this unlawful discrimination, including unreasonable refusals to deal and refusals to offer carriage at the same prices, terms, and conditions as offered to cable distributors.

Thank you.

Mr. HUGHES. Thank you, Mr. Phillips.

[The prepared statement of Mr. Phillips follows:]

NATIONAL
RURAL
TELECOMMUNICATIONS
COOPERATIVE

Rhodeland Park
2201 Cooperative Way
Suite 600
Herndon, Virginia
22071-3025

Phone: 703-787-0874
Fax: 703-787-3555

Testimony of

Bob Phillips
Chief Executive Officer
National Rural Telecommunications Cooperative

Submitted to
Subcommittee on Intellectual Property and Judicial Administration
Committee on the Judiciary
United States House of Representatives
July 10, 1991

EXECUTIVE SUMMARY

NRTC strongly supported enactment of the Satellite Home Viewer Act of 1988 (SHVA). NRTC continues to believe that the SHVA is essential because it:

- Provides a legal framework for the retransmission of broadcast programming to home satellite dish (HSD) owners;
- Recognizes the importance of preventing piracy of satellite signals; and
- Prohibits discrimination against HSD distributors by satellite carriers.

Despite the supportive action taken by Congress, the HSD market is in many respects not working, because: (1) certain cable programmers continue to deny distributors access to programming, resulting in extremely poor penetration of these programs in rural areas; (2) piracy continues to be very pervasive in the HSD market; and, (3) both cable programmers and satellite carriers charge HSD distributors much more for programming than they charge cable operators.

While the SHVA of 1988 does not address all of these problems, it specifically prohibits discrimination by satellite carriers. Distributors, however, lack standing to assert remedies for the discrimination which has occurred. The SHVA should be amended to clearly allow an HSD distributor to bring action against a satellite carrier for unlawful discrimination, including unreasonable refusals to deal and refusals to offer carriage to the HSD distributor at the same price, terms and conditions as such service is offered to cable operators. This amendment is needed to ensure that satellite carriers who enjoy the benefits of a statutory compulsory license do not unlawfully discriminate in the use of this license. Such discrimination undermines the very purpose of the SHVA.

Testimony of Bob Phillips, Chief Executive Officer, NRTC

Good Morning, Mr. Chairman and members of the Committee. My name is Bob Phillips. I am the Chief Executive Officer of the National Rural Telecommunications Cooperative (NRTC). I appreciate this opportunity to appear again before your Committee to discuss the important issues relating to telecommunications and the Copyright Act.

The National Rural Telecommunications Cooperative (NRTC) is the national organization of 572 rural electric and telephone systems. NRTC was established in 1986 to deliver television programming to the many rural Americans who live in remote areas. These rural families live beyond the economic reach of hardwire cable television services and they often do not receive good off-the-air broadcast television. Today, NRTC distributes its "Rural TV"™ satellite program service to nearly 60,000 rural homes.

We commend this Committee for the strong leadership role that it has taken in developing and passing the Satellite Home Viewer Act of 1988 (SHVA). The SHVA remains essential to the home satellite dish market because it:

- Establishes a legal framework for the retransmission of broadcast programming to home satellite dish (HSD) owners;
- Recognizes the importance of preventing the piracy of satellite signals; and
- Prohibits discrimination against HSD distributors by satellite carriers.

The Report language accompanying the SHVA included the following explanation of the need for this important legislation:

> "Need for Legislation
> Despite the explosion in recent years of new technologies and outlets delivering video programming, millions of Americans are not sharing in the programming bounty available from broadcasters or over cable systems. Presently, as many as one to six million households are in areas where the reception of off-air network signals is not possible or is of unacceptable quality. A number of these households are not presently served, and likely never will be served by cable systems. . . . Many of these consumers live in rural areas and are dependent upon satellite antenna systems for the delivery of any video programming."

Mr. Chairman, I believe that the SHVA is as needed today as it was in 1988 when both NRTC and Mr. Bob Bergland of the National Rural Electric Cooperative Association (NRECA) appeared before this Committee to testify in strong support of your efforts to enact the SHVA.

NRTC strongly supports the compulsory license that was provided by the SHVA. I believe that the compulsory license should be available to the home

satellite dish (HSD) market on the same basis that it is available to the cable industry. There is no reason for this license to sunset in 1994 for the HSD market while the cable industry can continue to benefit indefinitely from its compulsory license. This would result in unfair treatment of rural as compared with urban consumers. In addition, NRTC notes with concern the recent debate regarding retransmission consent. This threatens to increase costs to rural consumers and potentially deny them access to programming. For these reasons, we oppose retransmission consent.

I appreciate this opportunity to appear before you today nearly three (3) years after enactment of the SHVA. I would like to report to you on the functioning of the home satellite dish (HSD) market. I would also like to propose a much needed technical correction to the SHVA.

Problems in the Home Satellite Dish Market

Mr. Chairman, despite enactment of the SHVA, we regret to report that in many respects, the HSD market is not working. Substantial problems continue, including:

- Restricted access policies of certain cable programmers;
- Substantial levels of piracy; and
- Significant and unwarranted price discrimination by both satellite carriers and cable programmers.

Please allow me to briefly address the first two issues. My testimony will focus on the third issue -- unwarranted price discrimination, particularly by satellite carriers.

Restricted Access Policies of Certain Cable Programmers

Congressional pressure has forced many cable programmers to offer HSD distributors access to programming. However, there are program services that still refuse to deal. One notable example is Turner Network Television (TNT). TNT has been touted as a "cable exclusive" product. Cable operators across the nation have tied-up exclusive rights to provide TNT within their cable franchise and adjoining areas.

For home satellite dish owners who live outside the cable distribution areas for TNT, TNT is available only from one source--Turner Home Satellite Services.

Turner's discriminatory pricing policy has also been a factor in limiting distribution to HSD owners. Cable owners pay $0.37 per month for TNT distribution on their systems. The same cable operator pays $1.00 per month wholesale for TNT signal distribution to the HSD market. So while TNT is included in most cable basic packages, in the HSD market, it is available on a retail a la carte basis for $2.50 per month.

Testimony of Bob Phillips, Chief Executive Officer, NRTC

This restricted access policy has had a detrimental effect on the HSD market and rural viewers in general. Today, while 90% of all cable consumers have TNT access over their cable service, only 10% of home satellite dish consumers receive TNT.

TNT is the exclusive provider of several National Football League and National Basketball Association games, as well as the NBA Championship play-offs. These same professional sports leagues have received an anti-trust exemption from Congress to assist them in prospering for the public benefit. Yet, they have established exclusive television distribution arrangements with TNT which discriminate against rural Americans and those who can only afford off-air television.

There are other examples of programming services which are restricting their distribution in favor of cable-owned providers to the HSD market. There are also examples of programmers who make the cost of distribution unacceptably high, and thereby block access. These practices are particularly damaging to citizens who live in more remote rural areas.

Pricing

Today, NRTC pays more than $10 at wholesale for a package of 18 basic services. This same package of services can be purchased by a small cable operator for less than $2.25 per month. NRTC pays, on average, 460% more than a cable operator would pay for basic programming.

These pricing practices are unfair and contrary to promoting competition and extending services to all Americans. I am sorry to report to this Committee that some of the worst examples of price discrimination are those of satellite carriers who charge HSD distributors, like NRTC, many times what they charge cable operators.

Piracy

The Federal Communications Commission's recently issued report on satellite carrier discrimination noted that:

> "The industry consensus figure for the extent of HSD piracy is the 50-60% range."

The records of General Instrument, the owner of the VideoCipher scrambling technology, show that from January 1, 1991 through July 4, there has been virtually no growth in net programming sales. In fact, while industry satellite system sales figures show that 20,000 to 30,000 satellite systems have been sold each month, there has been a loss of 848 legal, paying subscribers.

Testimony of Bob Phillips, Chief Executive Officer, NRTC

This is not a picture of a healthy, competitive market. As a matter of fact, the piracy situation is an industry embarrassment. Piracy has put many honest dealers out of business and has kept many rural utilities from providing satellite service to their member/consumers.

We're aware that General Instrument intends to implement a technical fix to piracy in 1992. We are pleased about this, but we will be watchful to determine the success of the fix and to ensure that honest consumers, who have invested in the current broken technology, will not be penalized.

At the same time, we recognize that price discrimination against home satellite dish consumers has been a major factor in encouraging piracy. Pricing policies must be fair and non-discrimnatory for the current subscriber base and those who wish to invest in home satellite dish service in the future.

Discrimination by Satellite Carriers

The SHVA prohibited satellite carriers from unlawfully discriminating against distributors to the home satellite dish market. The SHVA also required the FCC to conduct an inquiry into discrimination by satellite carriers against HSD distributors.

On June 5, 1991, the FCC issued its report on satellite carrier discrimination against HSD distributors. (FCC Report General Docket 89-88, "Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming," released June 5, 1991.) The FCC concluded that:

> "as a general matter, there are significant disparities in some of the prices charged by some carriers to home dish distributors as compared to the prices charged to cable companies and other customers for superstation and network station programming. Some of these disparities are not justified by the cost of providing service as documented in this proceeding."

I'd like to highlight examples of price discrimination that the FCC cited.

> "In one example, based on provisions in contracts submitted, a satellite carrier charges a small cable system with thirty subscribers a monthly rate of 14 cents per station in a package of three stations. For this same set of signals, i.e., the same station if purchased in a package of three, the carrier charges a distributor 75 cents per station, per subscriber, per month."

The Commission said these types of examples are not isolated and represent the industry norm.

The Commission also examined the carriers' cost of providing service to the HSD market and found that:

"Generally, many distributors appear to be paying between $.30 and $.80 per customer, per station, per month over what the carriers have represented their cost of service to be."

There is no cost justification or other valid basis for this type of wholesale pricing disparity by a satellite carrier. Satellite carriers do not create the programming. They simply retransmit one satellite feed to both the cable and the dish markets. Under the compulsory license, the copyright owners who produced the programming receive only **$0.12** for superstations and **$0.03** for network stations. The satellite carriers use the copyright license to gouge the home dish distributor **$0.30** to **$0.80** more than their cost of service. Most carriers charge cable operators **$0.10** or less to deliver the same superstation or network station signals. Why should the carriers be allowed to collect a premium of **$0.30** to **$0.80** per subscriber per month from the HSD market?

If we use NRTC's subscriber base of nearly 60,000 who take, on average, 5 superstations per customer, and use the low figure of $.30 cents per customer per month cited by the FCC, this represents a cost to NRTC which is more than $1 million per year above the satellite carriers' cost of service.

This discriminatory and unfair pricing has been occurring for more than five years. Over this period, NRTC and the consumers it serves have been charged many times more than cable pays and millions of dollars more than the cost of service.

Remedies Against Discrimination by Satellite Carriers

Communications Act

Mr. Chairman, in view of the clear evidence of unwarranted discrimination against HSD distributors, NRTC has felt a responsibility on behalf of its consumers to seek regulatory and legislative relief. NRTC supplied extensive evidence to the FCC during its inquiry into discrimination by satellite carriers. NRTC filed Formal Complaints against three carriers. These Complaints are now in the discovery stage and will follow the normal course.

In its report, the FCC determined to resolve the question of its authority to provide remedies against unlawful discrimination by satellite carriers within the context of NRTC's pending Complaints.

In the complaint proceedings, all of the satellite carriers have argued to the FCC that they are "private carriers" for the purpose of serving the HSD market and are therefore exempt from the non-discrimination provisions of the Communications Act. This argument is being made even by those carriers that consider themselves "common carriers" for service to the cable market.

Testimony of Bob Phillips, Chief Executive Officer, NRTC

Copyright Act

Another possible remedy against unlawful discrimination by a satellite carrier would be an infringement action in the courts based on the SHVA prohibition against discrimination by satellite carriers under §119(a)(6).

Unfortunately, it appears that NRTC, as a distributor, may lack standing under the SHVA to take independent action against a satellite carrier, because NRTC is not the copyright owner of the programs it delivers. NRTC has been advised by the Copyright Office that it is of the opinion that "distributors" as defined in the SHVA would not have status as aggrieved parties to bring a private right of action in Federal Court under the Copyright Act for discrimination in the provision of superstation and network station programming under the SHVA.

After the FCC issued its report on discrimination by satellite carriers, NRTC met with representatives of the Motion Picture Association of America (MPAA). These representatives informed us that, despite the evidence of discrimination, they would not be inclined to take action against a carrier for discrimination against a distributor. The MPAA indicated that it opposes the entire philosophy of the compulsory license. Thus, unlawful discrimination by a satellite carrier in the use of this license may not be considered by the MPAA as detrimental to the corporate interests of the MPAA membership, even though this discrimination results in unduly high costs to consumers and limits the degree to which programming is made available on a widespread basis under the compulsory license.

Mr. Chairman, as you know, satellite carriers enjoy the benefits of a statutory compulsory license. They are also prohibited by the SHVA from unlawfully discriminating against a distributor in the use of this license. But, if a distributor cannot take action against a satellite carrier for unlawful discrimination, the very purpose of the SHVA is undermined.

Providing Standing to HSD Distributors

NRTC respectfully requests that the SHVA be amended to ensure that a distributor that has been unlawfully discriminated against has legal standing to take action. It makes no sense to give standing only to copyright holders that may have no corporate interest in pursuing such an action. Specifically, NRTC requests that the Committee pass a Technical Correction to the SHVA, which would:

1. Provide that a distributor may bring action against a satellite carrier for discrimination and such distributor shall be entitled to the remedies referenced in § 119(a)(6).

2. Provide that in determining whether any satellite carrier has violated the prohibition against discrimination under §119(a)(6), such carrier shall be determined to have violated this prohibition if it:

a. has unreasonably refused to deal with any distributor of video programming; or
b. has refused to offer satellite carriage service on substantially the same price, terms and conditions to distributors to home satellite earth stations as such service is offered to other multichannel video programming distributors.

Mr. Chairman, I applaud the leadership of this Committee and I appreciate the continuing interest of the Committee in this important issue.

Telecommunications will be increasingly vital to the economic and social life of our nation. We believe that it is in the interest of our nation that all Americans -- rural and urban, rich and poor -- to the broadest extent possible, have access to the information, education and entertainment that flows through our telecommunications systems. As this process unfolds, we believe that the Congress must promote competition among technologies and institutions and ensure a non-discriminatory marketplace that promotes access at affordable costs. The amendment to the SHVA that I have proposed is an important element in such a policy.

I appreciate this opportunity to appear before you today and I would be pleased to respond to any questions.

Mr. HUGHES. Mr. Padden, welcome.

STATEMENT OF PRESTON R. PADDEN, SENIOR VICE PRESIDENT, AFFILIATES, FOX BROADCASTING CO., WASHINGTON, DC

Mr. PADDEN. Thank you, Mr. Chairman. I have a brief summary of my written testimony.

We believe that your review of the cable and satellite statutory copyright license is particularly timely. The video marketplace in this country is in the midst of near revolutionary change. Frankly, we harbor grave doubts regarding the capacity of governmental processes to keep pace and to continue to manage a system of government-prescribed copyright license preferences in the face of this rapidly evolving marketplace.

In fact, we believe the subcommittee faces two distinct alternative courses. First, you can stay in the business of granting and managing compulsory or statutory copyright licenses and face what we believe will be a hopelessly conflicting and intractable morass of new technological claimants and a constant need for contentious legislative adjustment. Or, in the alternative, you can begin to chart a course of orderly transition back to a free market where the copyright owner, not the Government, will have the burden of sorting out the conflicting licensing opportunities as the marketplace unfolds.

As an indication of the complexities that we believe lie ahead, I'd like to provide the subcommittee with a few simple and concrete examples of substantial anticompetitive effects that have developed under the existing cable and satellite licenses. You may wish to refer to the illustrations attached to my written testimony.

The first effect that concerns us arises under the cable license, and is depicted on attachment No. 1 of my testimony. Under this license, cable systems may carry on a local copyright-free basis those stations that were entitled to carriage under the FCC's 1972 "must carry" rule. This was a complex formula that effectively grandfathered cable carriage of broadcast stations as of 1972. The result is that older, more mature stations, typically those affiliated with ABC, CBS, or NBC, may be carried copyright-free throughout their television market. By contrast, less mature stations, typically operating as independents or as Fox affiliates, frequently are considered copyright distant signals in areas beyond a 35-mile radius and may not be carried by cable systems without the payment of substantial copyright fees. We respectfully suggest that this distinction as between television broadcast signals from the same city in the same television market makes absolutely no sense as a matter of copyright policy.

Our second example of a distortive effect arises under the Home Satellite Viewing Act, and is depicted on attachment No. 2. Under the satellite statutory license, carriers are not permitted to sell the signal of one ABC, CBS, or NBC affiliate to consumers residing within the local service area of another ABC, CBS, or NBC affiliate. However, carriers are permitted to beam the signal of a Fox affiliate into the service area of other Fox affiliates, thereby destroying the exclusivity of their network relationship.

The third anomaly we wish to point out is depicted on attachment No. 3 and relates to MMDS systems, sometimes referred to

as wireless cable. MMDS operators are claiming the right to avail themselves of the compulsory copyright license applicable to conventional cable systems. However, unlike conventional cable systems, the MMDS operators are not bound by the FCC rules that safeguard broadcasters' exclusive program contracts.

We think these few simple examples illustrate that today's television marketplace is evolving too quickly for government copyright licensing to keep pace with, and it's only going to get worse. Will this subcommittee grant a new compulsory license to wireless cable? Will it extend the satellite license beyond its scheduled sunset? What about the telephone companies? Will they get a compulsory license?

In contrast to this maze of tough questions, circumstances may present the subcommittee with a historic consensus among the principal industry players, a consensus that the time has come to chart a transition from government licensing back to the free market. Based on our conversations with many cable operators and other marketplace players, there are clear signs that the cable and satellite compulsory licenses may be nearing the end of their useful lives. As more and more distribution opportunities unfold, the option of seeking exclusive licenses is certain to become an increasingly important competitive tool for everyone. For this reason, it may be possible to forge a consensus favoring a transition away from government licensing. The satellite license with its phased sunset, including a period of mandatory arbitration, may serve as a useful guide for the way out of this thicket. Of course, care must be taken to avoid unintended consequences for small, rural systems and ultimately for consumers.

Fox commends the subcommittee for conducting this oversight hearing. We believe that a useful next step would be to appoint a panel of industry representatives to study the issues and make recommendations to the subcommittee regarding an orderly transition back to free market copyright licensing.

Thank you.

Mr. HUGHES. Thank you, Mr. Padden.

[The prepared statement of Mr. Padden follows:]

Testimony of

PRESTON R. PADDEN
SR. VICE PRESIDENT, AFFILIATES
FOX BROADCASTING COMPANY

Summary

Subcommittee review of the cable and satellite statutory copyright licenses is particularly timely. Numerous unintended competitive distortions have arisen in connection with the operation of these licenses. For example, many newer broadcast stations, that operate as independents or as Fox affiliates, are considered copyright "distant" stations on cable systems in their own market -- systems that carry the ABC, CBS and NBC affiliates as copyright-free "local" stations. Moreover, rapid technological developments in television are likely to embroil the Subcommittee in endless controversy over management of these licenses and with regard to their extension to MMDS operators, telephone companies and other new entrants into the video marketplace.

Fox urges the Subcommittee to appoint a panel of industry participants charged with developing consensus guidelines for effecting a transition back to free market copyright licensing. As the television marketplace becomes more competitive, all participants have an increasing interest in the option of entering into exclusive licenses. For this reason, an industry consensus -- heretofore an elusive goal -- may now be possible.

Thank you Mr. Chairman. My name is Preston Padden and I am Sr. Vice President-Affiliates of Fox Broadcasting Company. I appear here today on behalf of our parent company Fox Inc. Our principal operating businesses include the production and distribution of motion pictures; the production and distribution of television programming; the operation of major market commercial television broadcast stations; the operation of an emerging broadcasting network and the operation of an innovative new cable service to bring our network programming directly to cable systems in areas where we cannot secure broadcast distribution.

Previously, I served as Assistant General Counsel of Metromedia Incorporated and later as President of the Association of Independent Television Stations. In these capacities, I participated in the discussions and debate leading up to enactment of the cable compulsory copyright license in 1976 and the home satellite statutory license in 1988.

We appreciate this opportunity to appear before the Subcommittee in connection with its oversight of the operation of the cable and satellite copyright licenses. Your review of these governmentally conferred licenses is particularly timely. The video marketplace in this country is in the midst of near revolutionary change. In the last ten

years, the number of independent television stations tripled. The long sought fourth television network finally was born. Cable penetration more than doubled and the number of national cable networks rose to more than 70.

The next ten years promise even more radical change. In the decade of the 90's, we will almost certainly see entry by telephone carriers into the television business. We will also likely see the emergence of Direct Broadcast Satellites as full-fledged video competitors. And, many seers predict that the inevitable convergence of video, telecommunications and computer technology will give birth to currently unimagined new technologies and video services.

As these likely developments suggest, our national television marketplace is extremely dynamic and is characterized by fast paced change. In some respects, the cable and satellite licenses contributed to the increasing competition and diversity we enjoy today. But, increasingly, these licenses seem to create unintended competitive distortions. And, we harbor grave doubts regarding the capacity of governmental processes to keep pace and to continue to manage a system of government prescribed copyright licenses and preferences in the face of tomorrow's rapidly evolving marketplace. In fact, we believe the Subcommittee faces two distinct alternative courses. First, you can stay in the business of granting and managing compulsory or statutory copyright licenses and face what we believe will be a hopelessly conflicting and intractable morass of new technological claimants and a constant need for contentious

legislative adjustments. Or, in the alternative, you can begin to chart a course of orderly transition back to a free market where the copyright owner, not the government, will have the burden of sorting out the conflicting licensing opportunities as the market unfolds.

As an indication of the complexities that lie ahead, I'd like to begin by providing the Subcommittee with three simple and concrete examples of substantial anti-competitive effects that have developed under the existing cable and satellite licenses. These examples are intended not as pleas for special relief for Fox or its affiliates, but as evidence of the unintended consequences that can result from government intervention into a dynamic and rapidly changing marketplace.

The first effect arises under the cable compulsory copyright license and is depicted on Attachment #1 to my testimony. The two major rating services, Arbitron and Nielsen, divide the country into distinct television markets. The ability of each individual station to sell advertising time is determined by the audience ratings that it generates within the counties that Arbitron and Nielsen have assigned to its market. Under the cable compulsory copyright license, cable systems may carry on a "local" copyright-free basis, those stations entitled to carriage under the FCC's 1972 must-carry rules -- a complex formula that effectively grandfathered cable carriage of broadcast stations as of 1972. The result is that older, more mature stations -- typically those affiliated with the ABC, CBS or NBC television networks -- may be carried as copyright-

free local signals by cable systems throughout their television markets. By contrast, less mature television broadcast stations -- typically operating as independents or as affiliates of Fox -- are considered copyright distant signals in many portions of their own television market, and may not be carried by cable systems without the payment of substantial distant signal copyright fees. For example, in the Dallas, Texas market, the ABC, CBS and NBC stations are carried copyright-free on cable in more than 13,000 homes in Lamar County. In the same 13,000 homes, the Dallas Fox affiliate is considered a distant signal for copyright purposes. The same distorted effect occurs in Gainesville in Cooke County, in Greenville in Hunt County, in Sulphur Springs in Hopkins County and in Mineola and Winnsboro in Wood County. Looking at the Denver market, the ABC, CBS and NBC affiliates, and one mature independent station, may be carried as local signals in the communities on the western slope of the Rockies. The Denver Fox affiliate, a less mature station, is considered a copyright "distant" signal in the same communities.

With all due respect to the architects of the cable license, we would suggest that this distinction as between television broadcast signals from the same city in the same television market, makes absolutely no sense as a matter of copyright policy. Worse yet, a copyright system that facilitates the carriage of ABC, CBS and NBC affiliates to the exclusion of Fox affiliates and independent stations originating from the same city operates at cross purposes with the communications policy objective of encouraging the development of diverse and locally competitive broadcast outlets.

To be sure, no one ever intended the cable compulsory copyright license to operate in this fashion. Attempting to fix the problem by further government intervention would be difficult and complicated. By contrast, in a free market, all broadcast stations could easily negotiate for exhibition rights throughout their own television market thus providing a more nearly equal competitive environment.

Our second example of a distortive effect arises under the Satellite Home Viewing Act and is depicted on Attachment #2. Under the satellite statutory license, satellite carriers are not permitted to sell the signals of ABC, CBS and NBC affiliates to consumers residing within the local service area of an ABC, CBS or NBC network affiliate broadcast station. However, carriers are permitted to sell the signals of Fox affiliate stations within the local service area of other Fox affiliates. Again, this is a completely unintended consequence that results from dynamic marketplace developments that have occurred since the enactment of the statute.

The third anomaly we wish to point out relates to MMDS systems sometimes referred to as "wireless cable" and is depicted on Attachment #3. Although these systems are not yet a major competitive factor in the television marketplace, more and more MMDS systems are signing on in markets around the country. There is every reason to believe that they will become an important factor in our national system of television distribution. The anomaly here is that MMDS operators are claiming the right to avail themselves of the compulsory copyright license applicable to conventional cable

systems. However, unlike conventional cable systems, the MMDS operators are not subject to the network non-duplication and syndicated exclusivity rules of the FCC. The purpose of those rules is to permit local broadcast stations to realize and enforce the exclusivity for which they have bargained in their program acquisitions, notwithstanding the importation by cable of broadcast signals from other markets. By claiming a right to use the cable compulsory license without being subject to these regulations designed to ameliorate the impact of that license, the MMDS systems are operating in a manner never contemplated by the Congress.

These few simple examples illustrate that today's television marketplace is evolving too quickly for the government to keep pace with. And, its going to get worse. Will the Subcommittee grant a compulsory license to "wireless cable"? Will it extend the satellite license beyond its scheduled sunset? What about the telephone companies? Will they get a compulsory license? Does the answer depend on whether they buy an existing cable system or simply convert their existing copper wires to a broadband network?

In contrast to this hopeless maze of unanswerable questions, circumstances may present the Subcommittee with an historic consensus among the principal industry players -- a consensus that the time has come to chart a transition from government licensing back to a free market. In making this suggestion, it is not our intention be critical of any distribution technology. In particular, Fox has nothing but good things to

say about cable which has played an extremely important role in our development. Cable systems provide UHF broadcast stations with a boost toward viewing parity with older more established VHF stations. In fact, the growth of cable helped to spur the growth of UHF stations which made possible the birth of our emerging network.

Today, cable continues to assist us in our quest to compete with ABC, CBS and NBC by carrying our programs into areas where we are unable to secure broadcast distribution. We have developed a special 18 hour-per-day cable feed entitled "Fox Net" and have entered into cable affiliation agreements covering more than 250 systems serving approximately one million subscribers. We are the only broadcast network that affiliates directly with cable systems. Our ability to directly enter into these cable license agreements demonstrates that free market negotiations can succeed in this marketplace without the need for government licensing.

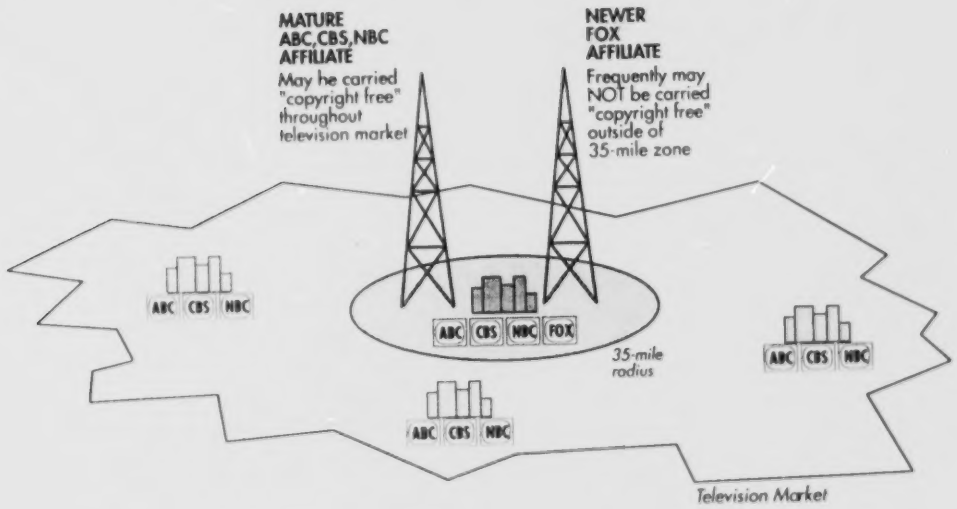
The option of entering into exclusive, or multiple non-exclusive license agreements, is a historical prerogative of copyright owners. Similarly, the option of seeking exclusive or non-exclusive licensing arrangements has been the historical prerogative of exhibitors and publishers. In fact, the current cable and satellite system of mandated non-exclusive licenses, at government prescribed prices, is a jarring departure from our nation's historical copyright principals. Continuation of these licenses also would hinder our international trade efforts to assure fair and competitive licensing of American intellectual property abroad.

Based on our conversations with many cable operators and other marketplace "players", there are clear signs that the cable and satellite compulsory licenses may be nearing the end of their useful lives. The option of seeking exclusive licenses is certain to become an increasingly important competitive tool for every distribution technology in this increasingly competitive marketplace. In fact, it is almost inconceivable that any new distribution technology would be able to gain a real foothold in the marketplace without securing exclusive rights to some distinctive and desirable programming. In particular, MMDS systems and direct broadcast satellite distributors have virtually no hope of achieving significant penetration in heavily cabled areas without serving as the exclusive distributors of distinctive and desirable programming. At the same time, increased competition for customers will make it increasingly important for broadcasters and cable operators to be able to secure exclusive programming rights.

Because the future opportunity to bargain and to negotiate in a free market environment seems so critical to every segment of this industry, it is conceivable to us that consensus recommendations from the industry may soon be possible. The satellite license, with its phased sunset, including a period of mandatory arbitration, may serve as a useful guide for cable. Of course, care must be taken to avoid unintended consequences for small rural systems and, ultimately, for consumers. However, our success in negotiating agreements with systems large and small leads us to believe that solutions can be found to any perceived transitional problems.

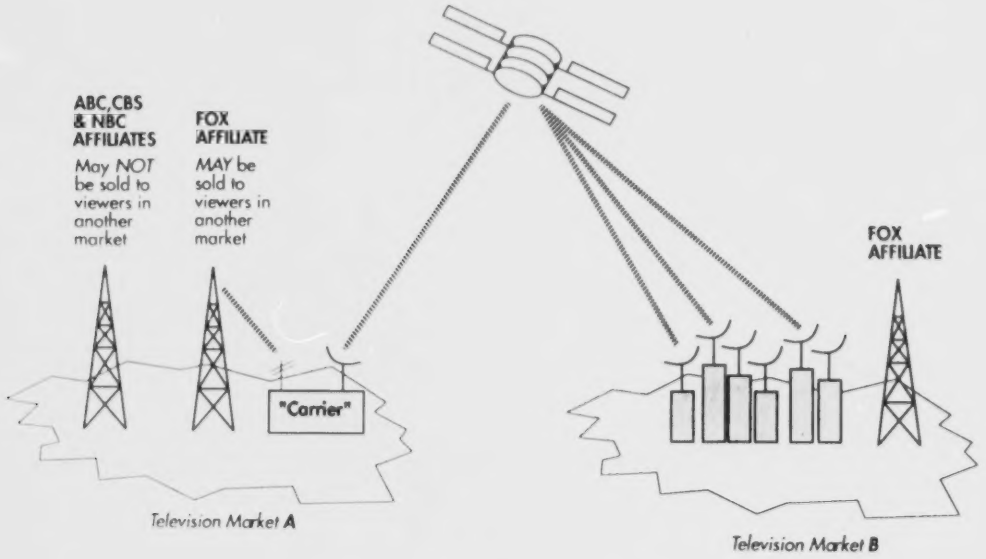
Fox commends the Subcommittee for conducting this oversight hearing. We believe that a useful next step would be to appoint a panel of industry representatives to study the issues and make recommendations to the Subcommittee regarding an orderly transition away from a system of government conferred licenses to a free market environment.

Figure 1. Cable Compulsory License Anomalies



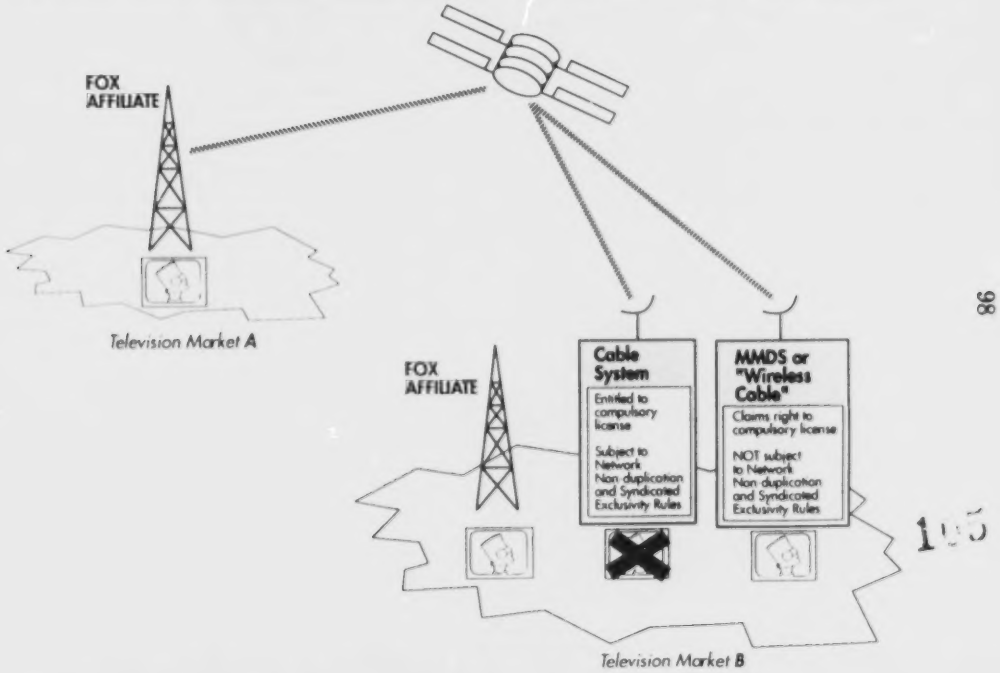
Attachment #2

Figure 2. Home Satellite Viewer Anomalies


ABC, CBS & NBC AFFILIATES
May NOT be sold to viewers in another market
FOX AFFILIATE
MAY be sold to viewers in another market
"Carrier"
Television Market A
FOX AFFILIATE
Television Market B

97

Figure 3. "Wireless Cable" Anomalies


FOX AFFILIATE
Television Market A
FOX AFFILIATE
Cable System
Entitled to compulsory license
Subject to Network Non duplication and Syndicated Exclusivity Rules
MMDS or "Wireless Cable"
Claims right to compulsory license
NOT subject to Network Non duplication and Syndicated Exclusivity Rules
Television Market B

Mr. HUGHES. Mr. Treeman, welcome.

STATEMENT OF JEFFREY C. TREEMAN, SENIOR VICE PRESIDENT AND CHIEF OPERATING OFFICER, UNITED VIDEO, INC., TULSA, OK

Mr. TREEMAN. Thank you, Mr. Chairman. Members of the subcommittee, thank you for holding this long-needed hearing on the copyright compulsory license.

United Video is a satellite carrier for broadcast station WGN from Chicago, WPIX from New York, KTVT from Dallas/Ft. Worth, and KTLA from Los Angeles. We provide these services to over 35 million U.S. homes served by 14,000 cable systems. Over 90 million U.S. cable consumers are benefiting from the cable compulsory license by watching UVI-delivered signals as well as 1 million more satellite dish consumers served by a sister company, Superstar Connection.

In presenting United Video's views on current copyright issues, I believe we can be helpful in informing this subcommittee on some of the practical considerations of proposed legislation. Compulsory license or, more correctly, the two compulsory licenses were both crafted in this subcommittee and passed by Congress. Both create an orderly system under which copyright holders are paid by cable systems and home satellite viewers. Ultimately, it's those viewers who benefit by receiving signals they could not receive absent the compulsory license.

Let's examine the working functions of compulsory license under the criteria of diversity, fee collection, and access. Apparently, there are 58 million cable homes in the United States. Cable systems serving these homes pay for their compulsory license, and virtually every cable system carries local and imported broadcast stations. In addition to the three largest cable superstations, there are many other broadcast stations retransmitted by satellite or microwave. Even though smaller, these stations are distributed under the provisions of the compulsory license, further contributing to program diversity. No question that diversity is being provided just as Congress intended.

The compulsory licenses are also for collecting copyright royalty fees. In 1983, $56.5 million was collected by the CRT from cable systems. By 1990, that figure had grown to $163.6 million. The percentage increase in copyright royalty collections during this period is almost 190 percent. This rate of increase is higher than the growth rate for the number of cable households, which was up 61 percent, and the growth rate in the average basic cable rate, which was up 101 percent for the same period. CRT collections from home satellite dish viewers in 1987 were $.2 million. For 1990, home satellite dish paid $3.2 million in copyright royalties. Compulsory licenses work and are collecting and distributing money just as Congress intended them to do.

A third test that may be made of compulsory license is access. Currently, there are 16 broadcast stations retransmitted by satellite. Not all 16 are alike. Some are old—the oldest began in 1976—and some are young. Some are large and some are small, reaching less than a half million cable homes. Some depend heavily on home satellite dish revenues for survival and some do not. The

relevance of these 16 satellite-transmitted stations and their variety is to point out that the Copyright Act of 1976 and the Satellite Home Viewer Act of 1988 are working to promote access and diversity.

Because distant station carriers are created by copyright law, anything that dramatically affects us is arguably an issue of copyright. United Video opposes two highly controversial proposals that are part of active legislative initiatives. Our current opposition arises because these issues have not yet been examined for what they are, U.S. copyright policy.

The first of these initiatives is retransmission consent. Retransmission consent is a proposal whereby broadcasters would be given statutory authority to approve retransmission of stations before it takes place. Retransmission consent is clearly on the public record as a copyright issue. The Copyright Office, the FCC, the U.S. court of appeals have all said so. Recently, the MPAA, representing copyright holders, has said so.

Mr. Chairman, aside from the obvious copyright implications, I'm also here to tell you that retransmission consent would do great damage to the practical operation of the copyright compulsory licenses by reducing programming diversity for consumers and adding unnecessary, purely inflationary costs to the current U.S. television infrastructure. If retransmission consent is approved, it lays another licensing scheme on top of the compulsory licenses which are already in place and which are working. In effect, the retransmission consent proposal creates a second copyright in the signal itself.

Another barrier to retransmission consent is language in current broadcasting programming contracts. Most current contracts between copyright holders and television stations contain language prohibiting retransmission consent.

The other legislative initiative is home satellite dish access and pricing. Both access and pricing were considered as copyright matters by this subcommittee as it reported out the Home Satellite Viewer Act. Even the FCC, which conducted an inquiry into HSD access and pricing, stated in its report that these issues may be more properly a copyright matter than a communications matter.

We're glad to see in this hearing the president of the NRTC, which indicates that they consider this subcommittee the proper forum for those issues. They introduced the access and pricing proposals.

By their very existence, both compulsory licenses allow open access for competing satellite carriers. Then why the need for new access and pricing assurances when those assurances are currently in place in existing regulation and law? Access and pricing legislation could have the effect of reducing the number of satellite signals available. Some retransmitted stations could be lost by both cable and home satellite dish consumers. Since such losses would result in reverse diversity and reduce CRT collections, they are clearly copyright issues.

Mr. Chairman, we feel the compulsory license has helped make the U.S. television system the envy of the world. In many ways, compulsory license works as the interstate highway system for television—unifying, entertaining, and informing even the remotest

corners of our country. This interstate television highway owes its existence to the copyright law, and that law owes its existence to this subcommittee.

We respectfully request that your subcommittee make a full examination of the copyright implications of, one, retransmission consent and, two, home satellite dish access and pricing proposals in any pending television legislation, cable or otherwise. Only through such an examination will the broad national public interest served by the present compulsory licenses be recognized above strident industry conflicts. Those conflicts sometimes threaten to obscure the public's interest entirely. If these functioning licensing systems are to be legislatively evolved, either directly or indirectly, we would like to see the same thorough consideration as when the compulsory licenses were created. And, further, we feel it only right that consideration be made by the same subcommittee that created the systems to begin with.

With the public interest benefits so reaffirmed, we wouldn't be surprised to see HSD compulsory license extended until the year 2000. Further, we would expect that the cable compulsory license would continue to serve U.S. consumers into the future instead of being battered around and eroded in peripheral issues.

Thank you for your time. I'd be happy to answer any questions.

Mr. HUGHES. Thank you, Mr. Treeman.

[The prepared statement of Mr. Treeman follows:]

STATEMENT OF JEFFREY C. TREEMAN

SENIOR VICE PRESIDENT AND CHIEF OPERATING OFFICER

UNITED VIDEO, INC.

I. INTRODUCTION

Mr. Chairman and members of the Subcommittee, thank you for holding this long-needed hearing on the copyright compulsory license and its role in our current national consumer television distribution system. My name is Jeff Treeman. I am Sr. Vice President and Chief Operating Officer of United Video, Inc. United Video is a satellite carrier of four broadcast stations -- WGN from Chicago, WPIX from New York, KTVT from Dallas/Fort Worth, and KTLA from Los Angeles. We provide these services to over 35 million U.S. homes served by the 14,000 cable systems who are our customers. By our estimates, over 90 million U.S. cable consumers are benefitting from the cable compulsory license by watching UVI-delivered signals as well as 1 million home satellite dish (HSD) consumers. The home satellite dish (HSD) homes are served through a sister company, Superstar Connection, Inc. Another 40 - 50 million consumers are being served by other carriers operating under cable and HSD compulsory licenses. Programming delivered through the compulsory license has been and remains an important part of millions of consumers' television fare, especially important to non-metropolitan citizens.

In representing United Video's views on current copyright issues, I believe we can help inform this Subcommittee on some of the practical and business considerations of proposed legislation. In doing so, I will hopefully echo the positions of all satellite carriers who exist by virtue of either or both of the compulsory licenses -- cable and home satellite dish (HSD).

2. WHAT IS COMPULSORY LICENSE?

Compulsory license, or more correctly, the two compulsory licenses, were both crafted in this Subcommittee and passed by Congress. The cable compulsory license was created by the Copyright Act of 1976 and the HSD compulsory license was created by the Satellite Home Viewer Copyright Act (SHVA) of 1988.

A carrier such as United Video is like a pipeline, or a trucking company, we receive programming that is broadcast in one locality and deliver it intact via satellite to cable systems or home satellite dishes in other localities all across the nation. We do so under the laws we've just named. The recipients of these retransmitted broadcasts make royalty payments to the Copyright Royalty Tribunal (CRT) which then distributes them to the owners of the programming UVI retransmits. This is the compulsory license at work in the U.S.

While some critics of the cable compulsory license argue that it is an impediment to freedom in the marketplace, we hold a differing view. The compulsory license performs an important function as a national television market exchange. It creates an orderly system under which copyright holders are paid by cable systems and home viewers. Ultimately, it is U. S. television viewers who benefit by receiving distant television signals -- signals they could not receive absent the compulsory license.

3. WHAT FUNCTIONS ARE PERFORMED BY COMPULSORY LICENSING?

Compulsory licensing performs many functions in order to deliver benefits to the general public. We will focus on three of the most important ones today.

FIRST, it is the stated intent of Congress with compulsory licensing to provide U.S. consumers with a broad diversity of television programming. (Please refer to Attachment A -- Congressional Statements.)

SECOND, both compulsory licenses were created to provide a payment mechanism under which copyright holders are paid by cable systems and HSD homes for programming they receive.

THIRD, both compulsory licenses also allow anyone who accepts the business risks to enter the broadcast retransmission business. In short, compulsory license opens the door -- provides access -- for businesses to provide

consumers with broadcast television stations -- an essential thread in the fabric of U.S. telecommunications policy.

4. COMPULSORY LICENSE IS WORKING.

To talk about what compulsory license is intended to be is one thing. To point to facts that demonstrate it is working as intended is another. Let's examine the working functions of compulsory license under the criteria of diversity, fee collection, and access.

A. FUNCTION 1 -- DIVERSITY. Currently there are 58 million cable homes in the U.S. Cable systems serving these homes pay for their compulsory license, and virtually every cable system carries local and imported (distant signal) broadcast stations.

Just look at how many consumers receive the 3 leading cable superstations, which operate by virtue of compulsory license.

Station	Total Consumers	Total Households
TBS-Atlanta	145 million	58 million
WGN-Chicago	84 million	30 million
WOR-New York	35 million	14 million

In addition to these broadcast stations, there are many other broadcast stations retransmitted by satellite or microwave which each serve a smaller number of homes. We estimate that each cable home in the U. S.

receives 3 retransmitted distant broadcast stations. Even though smaller, these stations, as distributed under the provisions of the compulsory licenses, further contribute to program diversity for U.S. consumers. No question that diversity is being provided just as Congress intended.

B. FUNCTION 2 --COPYRIGHT FEE COLLECTION.

The compulsory licenses are also for collecting money for copyright holders -- copyright royalty fees.

In 1983, $56.5 million was collected by the Copyright Tribunal (CRT) from cable systems for distribution to copyright holders. By 1990, that figure had grown to $163.6 million. (These figures do not include an additional 20% in collections for syndicated exclusivity surcharges between 1983 and 1989.) The percentage increase in copyright royalty collections during this period is almost 190%. This rate of increase is higher than the growth rate for the number of cable households (61%), and the growth rate in the average basic cable rate (101%) for the same period. (Please see Attachment B -- Copyright Royalty Payments.)

CRT collections from HSD viewers in 1987 were $.2 million. For 1990, the HSD total was $3.2 million.

(When critics of cable and the compulsory license refer to "free" use of programming, they would do well to acknowledge the more than $1.3 billion collected by the CRT to date under the cable compulsory license. Cable and HSD are both paying for their use of compulsory licenses. And, under this system copyright fees collected have increased dramatically over the past years.)

Could it be that allegations that copyright payments are insufficient are really protests against the CRT allocation of the cable royalty pool? We worry when this type of allegation broadens into the objection that "compulsory license doesn't work." Quite the contrary, compulsory license works and is collecting and distributing money just as it is intended to do.

C. FUNCTION 3 -- ACCESS TO BROADCAST SIGNALS.

A third test that may be made of compulsory license is access. Currently there are 16 broadcast stations retransmitted by satellite. Many other stations are retransmitted via microwave carriers. Not all 16 satellite stations are alike. Some are old (the oldest began in 1976), some are young. Some are large (reaching 58 million cable homes) -- some are small (reaching less than 1/2 million). Some depend heavily on HSD revenues

for survival, some do not. The relevance of all this is to point out that various companies have invested in satellite transmission of sixteen different stations. (And, if that's not enough, HSD consumers may choose from more than one supplier for thirteen of the sixteen competing satellite signals.) This certainly proves that the Copyright Act of 1976 and the SHVA of 1988 are promoting access.

While the cable compulsory license system enables distant broadcast station carriage, a component of that system, the copyright rate schedule established by the CRT, also limits it. The large increase in the number of distant broadcast stations carried by cable systems during the early 1980's has slowed greatly. Most cable systems are now carrying the maximum number of stations allowed before triggering the CRT penalty rate for added stations.

5. RETRANSMISSION CONSENT AND HSD ACCESS AND PRICING -- COPYRIGHT ISSUES

Because distant station carriers are creatures of copyright (having been created by copyright law), anything that dramatically affects us is arguably an issue of copyright. United Video opposes two highly controversial proposals that are part of active legislative initiatives.

My practical understanding tells me both are copyright issues. Both these proposals strike at the essence of copyright law, since both seem to circumvent original Congressional intent. Our current opposition arises because these issues have not yet been examined for what they are -- United States copyright policy. The first of these initiatives is retransmission consent.

A. RETRANSMISSION CONSENT is a proposal whereby broadcasters would be given statutory authority to approve retransmission of stations before it takes place.

For as long as there have been over-the-air commercial broadcasts, there has been a raging debate over retransmission consent. It's nothing new. Most recently, a retransmission consent provision was added to this session's Senate cable bill. The concept has been the subject of discussion in other House hearings as a proposal for a House cable bill this session.

To begin with, retransmission consent is clearly on public record as a copyright issue. The Copyright Office has said so. The FCC has said so. The U.S. Court of Appeals has said so. The MPAA, representing copyright holders, has said so. (Please see Attachment C -- Statements That Retransmission Consent Is A Copyright Issue.) Only the backers of this

concept who insist that signal and program are two different and separable interests are saying retransmission is not a copyright issue. Perhaps the ultimate question in deciding this issue would be "How much would consumers be willing to pay for the signal, apart from the programming?"

Mr. Chairman, aside from the obvious copyright implications, I'm also here to tell you that the "retransmission consent" proposal would do great damage to the practical operation of the cable copyright compulsory license, reduce programming diversity for consumers -- both HSD and cable -- and add unnecessary, additional, purely inflationary costs to the current U.S. television infrastructure.

Simply stated, the compulsory license dilemma created is this. Under operation of compulsory licenses, local broadcasters broadcast into the public domain and may be retransmitted by a common carrier. Provided the cable operator makes appropriate copyright payments, no further consent than compliance with the compulsory license is required. If retransmission consent is approved, it lays another "licensing" scheme on top of the compulsory license which is already in place and working. A cable company or carrier could no

longer retransmit solely under compulsory license. In addition to compulsory license, cable systems and carriers would have to get, that is pay for, consent from the broadcaster first. In effect the retransmission consent proposal creates a second copyright in the signal itself, which is not "copyrightable" under any definition of copyright. Without further examination, the inflationary aspects of pay for retransmission consent are obvious. But the inflationary aspects go deeper. (Please see Attachment D -- Retransmission Consent Fees Would Exceed Current Copyright Fees -- which shows how fees resulting from retransmission consent could exceed current copyright fees.

Another barrier to retransmission consent is language in current broadcast programming contracts. Most current contracts between copyright holders and television stations contain language prohibiting retransmission consent. To illustrate this, we've provided some samples of these contract limitations. (Please see Attachment E -- Sample Program Contract Language.)

One of the favorite current war chants is "compulsory license was for infant cable." But from our vantage point it seemed a larger intent was to give

consumers more television. Does this mean that retransmission consent should be passed, thereby invalidating the satisfied intention of Congress for television diversity? Please see Attachment F -- Consumer Benefits and Statistics From Select States to see how many real consumers will have real losses of programming and money under retransmission consent.

B. ACCESS AND PRICING.

Earlier my testimony touched on the compulsory license access function. With open access, competition (and therefore competitive pricing) follows. Both access and pricing were considered as copyright matters by this Subcommittee as it reported out the HSVA. That copyright law already contains language addressing pricing. Even the FCC, which conducted an inquiry into HSD access and pricing stated in its Report that these issues may be more properly a copyright matter than a communication matter. We're glad to see in this hearing the President of the National Rural Telecommunications Cooperative (NRTC) which indicates that the NRTC who introduced access and pricing proposals consider this Subcommittee the proper forum for those issues.

By their very existence both compulsory licenses allow open access for competing satellite carriers. Any entity wishing to take the economic risks can access signals for retransmission. Like any other business there are potential

risks and potential rewards. When Congress has clearly provided for open access, an additional layer of law such as proposed for access and pricing, jeopardizes the "separateness" of the HSVA compulsory license by threatening the loss of some current HSD carriers. We have never sought legislation to restrict access. In fact, United Video incurred added costs, while taking business and legal risks in order to sell our retransmission services to HSD before U. S. law was created to establish a system of copyright payments.

To set the record straight on a few points related to access and pricing, I would like to remind the Subcommittee that . . .

1. Since 1978 United Video has not increased its prices even once, for cable or for HSD.
2. Contrary to what is often reported, the price of UVI cable services is subject to a $100 per year minimum per receive site. The $.10 per subscriber per month price often quoted as "the cable price" is true only after the annual minimum is met.
3. United Video has provided voluntarily and actively access to home satellite dish (HSD), wireless cable (MMDS) and satellite master antenna television (SMATV - private cable)

customers, subject to their meeting credit standards and assuming responsibility for copyright payments.

4. When United Video contracts with cable companies for their sale of United Video services to the HSD market, it is at the HSD price, not the "cable" price.

5. In the 1991 FCC report on pricing in the HSD market, UVI and Superstar Connection were not named as HSD pricing discriminators and it was further noted by the FCC that the cable and HSD markets operate differently, having different costs and functions.

Why the need for new access and pricing assurances when those assurances are currently in place in existing regulations and laws?

Access and pricing legislation could have the effect of reducing the number of satellite signals available. Some retransmitted stations could be lost by both cable and HSD consumers. Since such losses would result in "reverse diversity" and "reduced CRT collections", they are clearly copyright issues. From United Video's perspective based on the practical effects, both access and pricing proposals are copyright matters with a capital "C".

6. REQUEST FOR FURTHER ACTION:

Mr. Chairman, we feel that compulsory license has helped make the United States television system -- the nation's network -- the envy of the world. In many ways, compulsory license works as the interstate highway system for television, unifying, entertaining, and informing even the remotest corners of our country efficiently and under an organized system. This interstate television highway owes its existence to copyright law, and that law owes its existence to this Subcommittee.

If we don't close the entire U. S. interstate highway system to fix New Jersey potholes on I-295 between the Auburn and Deep Water, New Jersey exits, why should our successful television copyright system be jeopardized for "surface patch" issues?

United Video has made great investment in order to provide consumers the services envisioned by Congress in the creation of compulsory licenses. We have complied with not only the letter, but the intent of the law in fulfulling our role in this nation's television infrastructure. We respectfully request that your Subcommittee make a full examination of the copyright implications of (1) the retransmission consent, and (2) HSD access/pricing proposals in any pending television legislation -- cable or otherwise. Only through such an examination will the broad national public interests served by the present compulsory

licenses be recognized above strident industry conflicts. Those conflicts sometimes threaten to obscure public interests entirely. If these functioning licensing systems are to be legislatively "evolved", either directly or indirectly, we would like to see the same thorough consideration as when the compulsory licenses were created. And further, we feel it only right that that consideration be made by the same Subcommittees that created the systems to begin with. With the public interest benefits so reaffirmed, we wouldn't be surprised to see HSD compulsory license extended until the year 2000. Further, we would expect that the cable compulsory license would continue to serve U. S. consumers on into the future instead of being battered around and eroded in peripheral issues.

Thank you for your time. I'd be happy to answer any questions you may have.

ATTACHMENT A

CONGRESSIONAL STATEMENTS

CONGRESS INTENDED THAT
COMPULSORY LICENSE PROVIDE
PUBLIC ACCESS TO DIVERSE
PROGRAMMING SOURCES

The following quotes from the legislative histories of the Copyright Act of 1976, which established the cable compulsory license, and the Satellite Home Viewer Copyright Act (SHVCA) of 1988, which enacted a compulsory license for distributors of programming to home satellite dishes, demonstrate Congress' intent that the compulsory licenses promote public access to diverse programming sources.

Cable Compulsory License

In a concurring statement to the House Report on the Copyright Act of 1976, Rep. George E. Danielson, a member of the House Committee reporting the legislation, explained:

> The copyright laws should not limit the extent to which cable serves the public interest. Although the Founding Fathers could not contemplate the size of the geographical distribution of the audience which can be reached by cable they certainly did not contemplate an arbitrary limitation on either of those factors. And it should be remembered that they delegated to the Congress the power to regulate copyright in order "to promote the progress of science and the useful arts".
>
> Cable has a yet unrealized capability to broaden our horizons and to bring education, information and entertainment to people everywhere. Surely this is in the public interest and for the public benefit. The copyright laws should not be used to restrict or impair that flow of knowledge.

> . . . We wished to permit and encourage the broader dissemination of communications through cable while being fair and equitable to the owners and users of copyrighted materials and at the same time protecting the public interest.

H. R. Rep. No. 1476, 94th Cong., 2d Sess. 361, reprinted in 1976 U. S. Code Cong. & Admin. News 5704, 5803.

Satellite Home Viewer Copyright Act

In 1988 Congress amended the Copyright Act to provide a limited compulsory license for distributors of broadcast programming to home dish owners. The House Report expresses Congress' intent to promote the widest possible dissemination of programming:

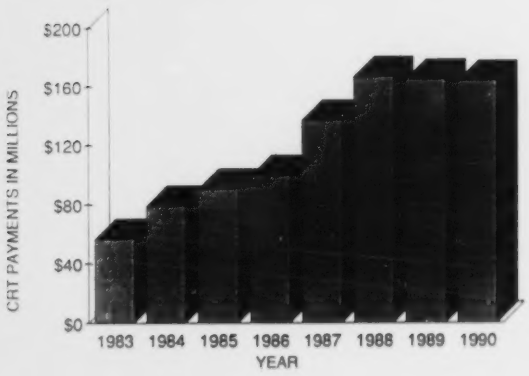
> The Committee concluded that legislation was necessary in order to meet the concerns of both the home earth station owners and the satellite carriers and to foster the efficient, widespread delivery of programming via satellite. The bill balances the rights of copyright owners by ensuring payment for the use of their property rights, with the rigts of satellite dish owners, by assuring availability at reasonable rates of retransmitted television signals.
>
> * * * * *
>
> . . . The proposal will not only benefit copyright owners, distributors, and earth station manufacturers; it also will benefit rural America, where significant numbers of farm families are inadequately served by broadcast stations licensed by the Federal Communications Commission.

H. R.Rep. No. 887, 100th Cong., 2d Sess. 14-15, reprinted in 1988 U. S. Code Cong. & Admin. News 5577, _____.

ATTACHMENT B

COPYRIGHT ROYALTY PAYMENTS

CABLE COPYRIGHT ROYALTY PAYMENTS HAVE MORE THAN DOUBLED IN THE PAST 8 YEARS



COPYRIGHT PAYMENTS
1983 - 1990

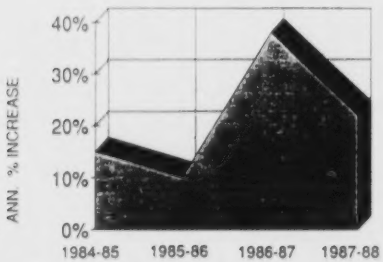
YEAR	CRT PAYMENT (Millions)
1983	$ 56.501
1984	78.642
1985	90.279
1986	99.236
1987	136.654
1988	166.691
1989	164.716
1990	163.620
8 year $ increase	$ 107.119
8 year % increase	+189.6%

Note: Copyright payments for 1983 to 1989 do not include amount payed for "Syndex Surcharge"
Source: CRT, Cable Royalty Funds 1983 - 1990.

United Video Marketing Information Department, 5/91

COPYRIGHT HOLDER COLLECTIONS
AVG. INCREASE IS MORE THAN 22% ANNUALLY
1984 TO 1988

(DISTRIBUTIONS OF 1989 AND 1990 CRT COLLECTIONS ARE NOT YET MADE)



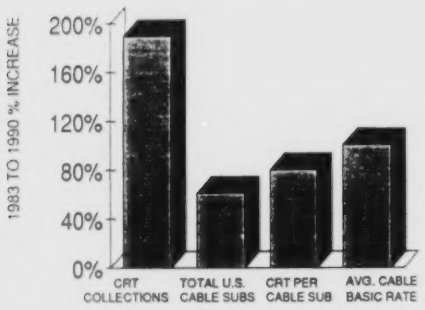
COPYRIGHT HOLDERS	1984 $ (Mil.)	1984 % of Tot.	1985 $ (Mil.)	1985 % of Tot.	1986 $ (Mil.)	1986 % of Tot.	1987 $ (Mil.)	1987 % of Tot.	1988 $ (Mil.)	1988 % of Tot.	INCREASES 1984-1988 $ (Mil.)	INCREASES 1984-1988 % INCREASE
MPAA	$ 52	67%	$ 65	73%	$ 71	72%	$ 99	73%	$ 121	73%		
SPORTS	13	17	12	13	14	14	18	13	22	13		
NAB (Comm. TV)	4	6	4	4	5	5	6	5	7	4		
OTHERS*	9	11	9	10	10	10	13	9	16	10		
TOTALS	$ 79	100%	$ 90	100%	$ 99	100%	$ 136	100%	$ 167	100%	$ 88	+112%
ANN. $ INCREASE				$ 12		$ 9		$ 37		$ 30		
ANN. % INCREASE				+15%		+10%		+38%		+22%		

*OTHERS INCLUDE:
PBS
MUSIC
CANADIAN
NATIONAL PUBLIC RADIO
DEVOTIONAL

Source: CRT, Cable Royalty Fund Distributions, 1984 to 1988, (does not include amount for "Syndex Surcharge").

United Video Marketing Information Department, 5/91

COPYRIGHT ROYALTY TRIBUNAL COLLECTIONS ARE GROWING FASTER THAN OTHER CABLE CONSUMER INDICATORS



YEAR	CRT COLLECTIONS (Millions) (1)	TOTAL U.S. CABLE SUBS (Millions) (2)	CRT COLLECTIONS PER CABLE SUB	AVG. CABLE BASIC RATE (3)
1983	$ 56.501	34.114	$ 1.66	$ 8.76
1984	78.642	37.291	2.11	9.20
1985	90.279	39.873	2.26	10.25
1986	99.236	42.237	2.35	11.09
1987	136.654	44.971	3.04	13.27
1988	166.691	48.637	3.43	14.45
1989	164.716	52.564	3.13	15.97
1990	163.620	54.871	2.98	17.56
INCREASE	$ 107.119	20.758	$ 1.33	$ 8.80
% INCREASE	+189.6%	+60.8%	+80.0%	+100.5%

Sources:
1. CRT, Cable Royalty Funds 1983 to 1990 (1983-89 do not include "Syndex Surcharge" payments).
2. A.C. Nielsen, 1983 to 1990 cable households.
3. Paul Kagan Associates, 1983 to 1990; 1990 estimate.

United Video Marketing Information Department, 5/91

ATTACHMENT C

STATEMENTS THAT RETRANSMISSION CONSENT

Is A COPYRIGHT ISSUE

COLE, RAYWID & BRAVERMAN

JOHN P. COLE, JR.
ALAN RAYWID
BURT A. BRAVERMAN
ROBERT L. JAMES
JOSEPH M. REILPER
FRANCES J. CHETWYND
MARGARET E. HARRING
JOHN D. SEIVER
WESLEY R. HEPPLER
PAUL GLIST
DAVID M. SILVERMAN
JAMES F. IRELAND III
MAURITA K. COLEY
SUSAN PARADISE BAXTER
ROBERT G. SCOTT, JR.
SUSAN WHELAN WESTFALL
JULIE A. MASON
THOMAS P. GUNNETT
LYNN S. FRIEDMAN*
JOHN DAVIDSON THOMAS
TIMOTHY G. FLYNN

*ADMITTED IN PENNSYLVANIA ONLY

ATTORNEYS AT LAW
SECOND FLOOR
1919 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D.C. 20006-3458
(202) 659-9750

CRAIG S. McCOY
(1943-1976)

CABLE ADDRESS
"CRAB"

TELECOPIER
(202) 452-0067

July 3, 1991

Via Telecopier

Mr. Jeff Treeman
United Video, Inc.
3801 S. Sheridan Road
Tulsa, OK 74145

Re: Compulsory License/Retransmission Consent

Dear Jeff:

Pursuant to your request, enclosed is a brief memo setting forth relevant legislative history for the Section 111 Cable Television Compulsory License and the Seciton 119 Satellite Home Viewers Act Compulsory License.

Additionally, the following statements of the Copyright Office, the FCC and the U.S. Court of Appeals for the Second Circuit, all relate to the fact that retransmission consent fundamentally impacts and/or is inconsistent with the copyright compulsory license. Each of these statements arose out of the FCC's decision in 1980 to deny a request by the NTIA to impose retransmission consent at the same time the FCC was removing the distant signal restrictions and syndicated exclusivity requirements. In filing comments in the FCC's rulemaking proceeding, the Copyright Office stated:

> "If a cable operator could be prevented by an FCC regulation from retransmitting the primary transmission for which the operator holds a statutory compulsory license, the very reasons and purposes for statutorily permitting the retransmission would be thrwarted."

Comments of the Copyright Office submitted November 26, 1979 in FCC Docket 20988.

In defending its decision not to impose retransmission consent in 1980, the Commission in a joint brief with the Department of Justice stated:

> "It is quite disingenous for petitioners to say that a Commission retransmission consent requirement would be something other than agency-enacted copyright legislation. The head of NTIA, the chairman of the House copyright subcommittee, the Register of Copyrights, and a then-Commission chairman have all testified that retransmission consent is the equivalent of copyright."

Finally, the U.S. Court of Appeals for the Second Circuit in upholding the Commission's decision not to impose retransmission consent, ruled that:

> "Retransmission consents undermine compulsory licensing because they would function no differently from full copyright liability, which Congress expressly rejected.
>
> . . .
>
> A rule imposing a retransmission consent requirement would also directly alter the statutory royalty formula by precipitating an increase in the level of payments of cable operators to obtain consent for program use. Such a rule would be inconsistent with the legislative scheme for both the specific compensatory formula and the appropriate forum for its adjustment."

Jeff, I have several other additional comments that were made by each of the above entities, but I believe that this should prove sufficient for your testimony. If you would like to put together a more comprehensive paper on this issue at a later time, please let me know.

Best regards,

Wesley R. Heppler

Enclosure

MOTION PICTURE ASSOCIATION
OF AMERICA, INC.
1600 EYE STREET NORTHWEST
WASHINGTON, D.C. 20006
(202) 293-1966
FAX (202) 452-0823

JACK VALENTI
PRESIDENT
AND
CHIEF EXECUTIVE OFFICER

June 19, 1991

Dear Dan

I come to you with some concerns about S. 12. I'd be so grateful if you and your staff would consider some questions I raise.

At the outset let me say (though you know me well enough so that I really don't have to say it) I am "an Inouye man," always have been, always will be. The last thing I want is to cause you any trouble or problems. And I might add, that America's filmed entertainment industry is globally successful as a great American trade prize in large part because of the Commerce Committee's commitment to protecting the disparate needs of consumers, producers and those who distribute creative works.

You personally have always been attentive to our concerns, as evidenced by your work on other areas of the Committee's cable bill, particularly on provisions to prevent discrimination against unaffiliated cable services with respect to carriage, channel placement, and other measures that would shrink access to subscribers.

As you know, MPAA members have been following closely the Commerce Committee's ongoing consideration of cable legislation. While most of the provisions contained in the Committee-approved bill were thoroughly reviewed and analyzed during extensive hearings, MPAA is seriously concerned about the retransmission consent provision that was added during the Committee's markup.

Although your staff is aware of our concerns with respect to retransmission consent, and has assured us that it was not the Committee's intention to interfere with the relationships between program suppliers and broadcast stations, or program suppliers and cable systems, we are fearful that the provisions do just that. There are a number of questions which need answering. For example,

1. What impact will retransmission consent have on the American consumer? What about small broadcasters? Network officials have publicly stated that retransmission consent will bring them tens of millions in new revenues. It is uncertain whether this transfer will increase the prices consumers must pay for cable services, or limit the ability of cable operators to purchase innovative and diverse non-broadcast programming.

2. How do existing contracts address retransmission rights, and how will the retransmission consent provision impact those agreements? The retransmission consent provision could be read to abrogate existing program licenses which require broadcast stations to obtain the agreement of program owners prior to extending their signals or consenting to their retransmission.

3. What impact would retransmission consent have on the cable compulsory copyright license?

   It is unclear how retransmission consent could coexist with the cable compulsory license. If that is the intent of the Committee, then would you not agree that there has to be a clearer definition to set forth the rights and relationships of program owners, broadcast stations and cable systems under such a legislative structure?

I hasten to point out that MPAA continues to support mandatory carriage and channel placement for qualified local broadcast stations.

4. What impact will retransmission consent have on a longstanding U.S. trade policy on copyrighted works -- particularly with regard to the "neighboring rights" concept found in some European nations?

As you can see, Dan, these queries stir us and draw our attention. Because the retransmission consent provision in S.12, is highly complex, would it not be useful to explore the entrails of retransmission consent, how it would work, what it would do, whether or not it collides with other marketplace realities? And would not the best way to do that be through a hearing which would outfit your Committee with more detailed evidence and data than it possibly has right now?

We are eager to work with your Committee to explore the implications of the new retransmission consent provision. I send this message to you with much affection, my dear friend.

Sincerely,

and warmly

Jack

The Honorable Daniel Inouye
United States Senate
Washington, D.C. 20510

ATTACHMENT D

RETRANSMISSION CONSENT FEES WOULD EXCEED CURRENT COPYRIGHT FEES

An Estimate Which Shows That If Retransmission Consent Fees Average $.05/Signal/Cable Home per Month, The Amount of U. S. Retransmission Consent Fees Would Exceed The Amount Currently Being Paid By Cable Consumers For Copyright Royalties Under The Compulsory License.

- This estimate is for local signals only and does not include retransmission consent fees for distant broadcast stations which would increase the total even more.

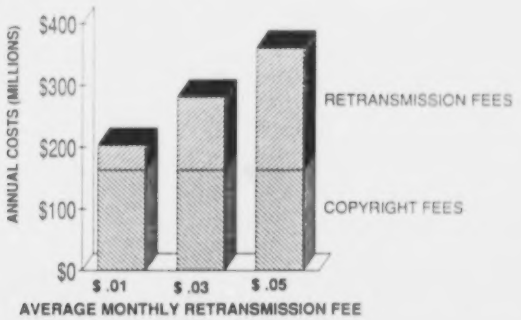
- CBS projected $72 million "plus" in new revenue from retransmission consent fees and related new revenue. This rate is $.11/home per month, 120% of the rate UVI used in this estimate.

  If CBS' projected rate held true, retransmission consent fees would add $436,000,000 to U. S. television infrastructure costs to consumers.

RETRANSMISSION FEES WOULD EXCEED CURRENT COPYRIGHT FEES

AT AN AVERAGE $.05 RATE (PER CABLE HOME, PER BROADCAST STATION)

RETRANSMISSION + COPYRIGHT (LOCAL STATIONS) TOTAL COST TO CONSUMERS (Millions)*: **$ 200** **$ 282** **$ 361**



IF BROADCAST STATIONS CHARGE:

AVERAGE MONTHLY RETRANSMISSION FEE PER CABLE HOME, PER STATION	U.S. CABLE CONSUMERS WOULD PAY AN ANNUAL TOTAL OF*:
$ .01	$ 37 MILLION
$ .03	$ 119 MILLION
$ .05	$ 198 MILLION

Notes:
1. The average cable subscriber has access to 6 broadcast stations (3 networks, 2 indies, 1 PBS).
2. Current cable universe is 55 million U.S. homes (A.C. Nielsen 2/91).

* When passed on to cable subscribers.

United Video Marketing Information Department, 5/91.

ATTACHMENT E

SAMPLE PROGRAM CONTRACT LANGUAGE

- Most Broadcast Station Contracts For Programs Don't Permit Retransmission Consent.
- The Retransmission Consent Provisions of S. 12 and Any Other Retransmission Scheme Would Require That Existing Contracts Between Program Suppliers and Broadcast Television Stations Be Amended.
- To Illustrate This Point, United Video Has Assembled From Its Files, Sample Language From Contracts of This Type Currently in Force in the U. S.

SAMPLE 1:

B. Other Telecasts: Lessee shall not Use or authorize others to Use the Rights in any Program over the facilities of any stations or cable systems of any nature (including booster, translator or repeater stations, satellite systems, cable television systems, relay telecasts, pay cable systems, subscription television systems, network simultaneous transmission, special educational stations), other than the Leased Station(s) or Cable System(s) unless a specific right to do so is granted in writing by Lessor requiring additional payments to be made for such right.

SAMPLE 2:

G. "Free Television Rights" means all rights to exhibit the Program by means of television transmission which is available for reception by the general public in private homes or offices without a separate consideration for viewing the applicable Program and which is transmitted to television receivers at least in part by over-the-air broadcast signals originating within Lessee's Specified Zone.

SAMPLE 3:

2. Lease: Subject to Lessee's performance of its obligations under this Lease, Lessor grants Lessee the Rights to Use the tangible personal property for each Program in accordance with the Exclusivity Provisions (if any) for the purpose of Using the Rights and related Incidental Rights in each Program in its entirety and only in the English language solely from the originating and existing transmitter and antenna tower of the broadcast television station(s) identified in the Cover Letter as Station(s) or to cablecast each Program in its entirety solely by the originating Cable System(s) identified in the Cover Letter as Cable System(s) for Free Television reception within Lessee's Specified Zone for the Lease Period. The Programs may include theatrical Motion Pictures, documentaries, television episodes, television series, special programs or movies made for television.

SAMPLE 4:

D. Other Prohibited Acts: Lessee shall not engage in any of the following acts: (i) sublicense or re-license any Program; (ii) copy, duplicate, record or transcribe or authorize or permit others to copy, duplicate, record or transcribe the Delivery Materials of any Program for any purpose; (iii) authorize or permit any other party to do any of the acts forbidden in this Agreement.

SAMPLE 5:

License: No right is granted to Station and Station shall not itself, and shall not authorize others to telecast, cablecast, exhibit or transmit any Picture over the facilities of any other television station or any booster, satellite, translater, community antenna station or system, network (whether for simultaneous or delayed transmission), relay, microwave or closed circuit system of any kind, or broadcast or transmit any Picture into any place where any admission is charged or where the reception or exhibition of any Picture is, or shall be, subject to the payment of any toll, license fee, subscription fee, or any other consideration or charge, all of which rights are expressly excluded from the license herein granted to Station.

SAMPLE 6:

21. It is understood and agreed that none of the programs licensed hereunder may be transmitted by Licensee by means of Satellite. In the event Licensee attempts such transmission, or in fact, is able to transmit any of the programs by such method, then this agreement shall be deemed terminated and Licensor shall be entitled to the remedies set forth in Paragraph 9 of this agreement.

SAMPLE 7:

Licensor grants the license to telecast the pictures designated in the Schedule hereto over the broadcast facilities only of the station licensed herein. Licensee will not transmit or broadcast, or authorize the transmission

or broadcast of any of the pictures by means of cable television systems, microwave systems, boosters, translators or satellite or other similar devices, and will not charge or collect any money, services, or valuable consideration from any party who transmits or broadcasts any of the pictures by means of cable television system, microwave system, boosters, translators or satellite or other similar devices. In connection therewith, any royalties or fees which may be paid to or received by Licensee by virtue of any statute, governmental regulation or authority or by operation of law or in any other manner, as a result of the amplification retransmission or relaying of each licensed picture on the same or any other frequency by any booster station, translator, repeater, satellite, cable television system, relay telecasts, simultaneous transmission or otherwise shall belong to Licensor. If received by Licensee, such royalties or fees shall be held by Licensee as agent and/or trustee for Licensor and shall be promptly paid over to Licensor.

SAMPLE 8:

Sublicense, Relicense or Assignment: This Agreement shall not be assigned, in whole or in part, by Station without prior written consent. Nor shall any of the Pictures licensed hereunder be sublicensed or relicensed by Station for telecast by any other person, firm, corporation or television station whether for telecast simultaneously with Station or for delayed telecast.

SAMPLE 9:

G. Assignments: The agreement may not be assigned in whole or in part by Licensee without the prior written consent of Licensor, which consent will not be unreasonably withheld; except that, in the event the Licensee assigns or transfers a substantial part of the right, title or interest Licensee possesses in the Station the Agreement may be freely assigned to the assignee or transferee without consent of Licensor.

ATTACHMENT F

CONSUMER BENEFITS AND STATISTICS FROM SELECT STATES

- There Are No Direct Consumer Benefits From Retransmission Consent
- Impact (Number of Homes) For
  - California
  - Colorado
  - Florida
  - Illinois
  - Kansas
  - Massachusetts
  - Michigan
  - North Carolina
  - New Jersey
  - New York
  - Oklahoma
  - Virginia
  - Wisconsin

CONSUMER BENEFITS FROM RETRANSMISSION CONSENT FOR SELECT STATES

STATES

* California	* North Carolina
* Colorado	* New Jersey
* Florida	* New York
* Illinois	* Oklahoma
* Kansas	* Virginia
* Massachusetts	* Wisconsin
* Michigan	

BENEFITS

	WITH STATION CONSENT	WITHOUT CONSENT
CABLE HOMES IN LOCAL MARKETS	* INCREASED COST	* LOSS OF LOCAL AND DISTANT SIGNALS
CABLE HOMES OUTSIDE LOCAL MARKETS	* INCREASED COST	* LOSS OF DISTANT SIGNALS (DON'T RECEIVE LOCAL SIGNALS)
HSD HOMES	* INCREASED COST	* LOSS OF DISTANT SIGNALS

NOTE: For this analysis, local market is defined as within 50 miles of a television station.

CONSUMER BENEFITS FROM RETRANSMISSION CONSENT FOR SELECT STATES

STATES

* California	* North Carolina
* Colorado	* New Jersey
* Florida	* New York
* Illinois	* Oklahoma
* Kansas	* Virginia
* Massachusetts	* Wisconsin
* Michigan	

BENEFITS

	WITH STATION CONSENT	WITHOUT CONSENT
CABLE HOMES IN LOCAL MARKETS	* INCREASED COST	* LOSS OF LOCAL AND DISTANT SIGNALS
CABLE HOMES OUTSIDE LOCAL MARKETS	* INCREASED COST	* LOSS OF DISTANT SIGNALS (DON'T RECEIVE LOCAL SIGNALS)
HSD HOMES	* INCREASED COST	* LOSS OF DISTANT SIGNALS

NOTE: For this analysis, local market is defined as within 50 miles of a television station.

5,456,750 California cable homes are in local TV markets.

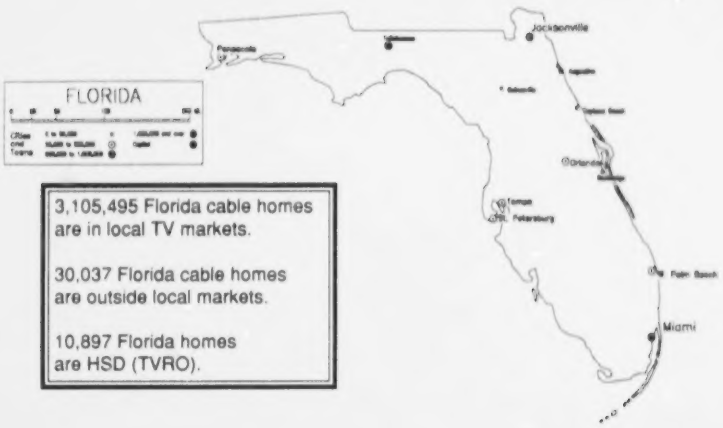
70,655 California cable homes are outside local markets.

18,593 California homes are HSD (TVRO).

609,570 Colorado cable homes are in local TV markets.

38,710 Colorado cable homes are outside local markets.

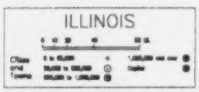
2,686 Colorado homes are HSD (TVRO).



3,105,495 Florida cable homes are in local TV markets.

30,037 Florida cable homes are outside local markets.

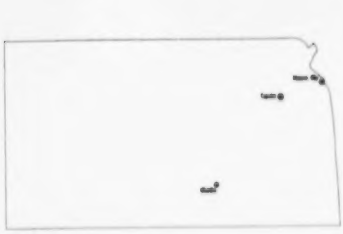
10,897 Florida homes are HSD (TVRO).



1,890,278 Illinois cable homes are in local TV markets.

8,269 Illinois cable homes are outside local markets.

7,021 Illinois homes are HSD (TVRO).



539,893 Kansas cable homes are in local TV markets.

35,435 Kansas cable homes are outside local markets.

3,357 Kansas homes are HSD (TVRO).

1,504,335 Massachusetts cable homes are in local TV markets.

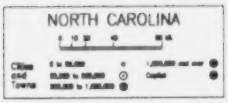
0 Massachusetts cable homes are outside local markets.

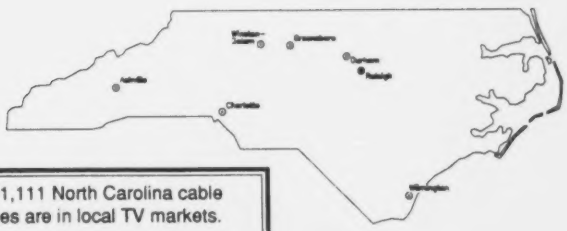
1,681 Massachusetts homes are HSD (TVRO).

1,767,366 Michigan cable homes are in local TV markets.

15,518 Michigan cable homes are outside local markets.

8,229 Michigan homes are HSD (TVRO).





1,301,111 North Carolina cable homes are in local TV markets.

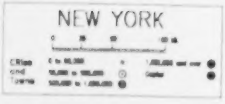
3,100 North Carolina cable homes are outside local markets.

8,061 North Carolina homes are HSD (TVRO).

1,856,873 New Jersey cable homes are in local TV markets.

0 New Jersey cable homes are outside local markets.

1,775 New Jersey homes are HSD (TVRO).



2,946,275 New York cable homes are in local TV markets.

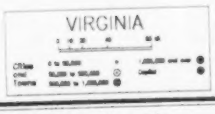
1,841 New York cable homes are outside local markets.

16,032 New York homes are HSD (TVRO).

563,306 Oklahoma cable homes are in local TV markets.

62,819 Oklahoma cable homes are outside local markets.

2,819 Oklahoma homes are HSD (TVRO).



1,293,918 Virginia cable homes are in local TV markets.

4,080 Virginia cable homes are outside local markets.

8,085 Virginia homes are HSD (TVRO).

814,119 Wisconsin cable homes are in local TV markets.

7,120 Wisconsin cable homes are outside local markets.

5,873 Wisconsin homes are HSD (TVRO).

Mr. HUGHES. Mr. Schmidt, welcome.

STATEMENT OF ROBERT L. SCHMIDT, PRESIDENT, WIRELESS CABLE ASSOCIATION, WASHINGTON, DC

Mr. SCHMIDT. Thank you, Mr. Chairman. Members of the subcommittee, I'll dispense reading from my prepared testimony, which will be submitted for the record, and I'd just like to cover some highlights of——

Mr. HUGHES. We'd appreciate that.

Mr. SCHMIDT. First of all, I think the statements made by members of the subcommittee earlier are comforting to me. Your goal of good public policy I think is, again, not only necessary, but to take a broader view of the situation than a more narrow view.

Fortunately, I think there is some legislative history. I'd like to cite for you and read this. This is legislative history from Public Law 94-553. This is section 106.

"The definition of 'transmit,' to communicate a performance or display 'by any device or process whereby images or sounds are received beyond the place from which they are sent,' is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them." This is from the conference report of the 1976 act. I submit that for the record.

Mr. HUGHES. Without objection, that will be received.

[The information follows:]

Clause (2) of the definition of "publicly" in section 101 makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process. The definition of "transmit"—to communicate a performance or display "by any device or process whereby images or sound are received beyond the place from which they are sent"—is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a "transmission," and if the transmission reaches the public in my form, the case comes within the scope of clauses (4) or (5) of section 106.

Under the bill, as under the present law, a performance made available by transmission to the public at large is "public" even though the

[page 65]

recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television service. Clause (2) of the definition of "publicly" is applicable "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."

Mr. SCHMIDT. Second, I think there is another example that is sort of an interesting twist here. What I have here is the form for filing at the Copyright Office, official business, U.S. Copyright Office, statement of accounts. Over on the section where it says, "Who can obtain a compulsory license," I'd like to read from that section as well:

"A system that meets this definition is considered a 'cable system' for copyright purposes, even if the FCC excludes it from being considered a 'cable system' because of the number or nature of its subscribers or the nature of its secondary transmissions."

[The information follows:]

Who Can Obtain a Compulsory License

Under the statute and Copyright Office Regulations, retransmissions are subject to compulsory licensing only if they are made by "cable systems".

"Cable system": A "cable system" is defined as "a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service." A system that meets this definition is considered a "cable system" for copyright purposes, even if the FCC excludes if from being considered a "cable system" because of the number or nature of its subscribers or the nature of its secondary transmissions.

"Individual" cable system: An "individual" cable system is defined generally as "each cable system recognized as a distinct entity under the rules, regulations, and practices of the Federal Communications Commission...." In addition, two or more cable facilities are considered as one "individual" cable system if either: (A) the facilities are in contiguous communities and are under common ownership or control; or (B) the facilities operate from one headend. Thus, even if they are owned by different entities, two cable facilities will be considered as one "individual" cable system if they share a common headend.

Mr. SCHMIDT. So, I don't understand how this can be so narrowly construed when, in fact, here's language specifically in a form that the Copyright Office is using.

I guess the key thing I'd like to try to do beyond some of those elements is to give you a better understanding of what is wireless cable. The term "MMDS" really is not applicable because if you look at what we do, we distribute up to 33 channels into the home viewer market, and those channels are utilizing different parts of the spectrum. They include ITFS, instructional television; MMDS, multichannel microwave distribution systems, OFS, Operation Fix Service; MDS, multichannel distribution. I call it alphabet soup.

The bottom line is we are regulated by the FCC. We are not defined in some respects as a cable system because we do not use streets and right-of-ways. We have a more efficient technology for distributing the signal from a head end. We are a local distribution system just like a cable system. We provide an addressable signal into the home environment, and, therefore, from a copyright standpoint, it's easy to determine who's watching our signal. I think there are many other instances that I can cite, but for the fact that in part of our secondary transmission we use a more efficient technology, microwave, we still use cables and wires.

When you reach the individual subscriber's premises, be it a multidwelling unit or a single family residence, we then use a coaxial cable. It comes into the consumer's premises. It looks like cable; it smells like cable. For purposes of the consumer, it's cable.

People buy programming. It's what they're after. I think that the issue that concerns us here today is we've assumed all along under this phrase in the definition of cable "other communications or other channels of communications" was some broad thinking on the part of the legislators when they passed this law back in 1976. I think the language I cite gives you support for that.

I guess my concern is, as I watch this tale unfold here, there seems to be a rush to judgment on the part of the Copyright Office, and I'm bothered by the predisposition in the presumptions that have been made: one, that one other technology, satellite master antenna, looks like it could be covered under the act, and another, wireless cable, looks like it shouldn't be covered under the act. I think if you examine the two specific models, you'll find out we look more like cable than they do, but I don't even want to apply that logic because, again, the bottom line is we are covered.

Now if, as the circumstances indicate, the Copyright Office needs some encouragement, I strongly urge the members of this subcommittee and other Members of Congress to reinforce the broad definition because I think the real purpose here is: to do what?—to protect intellectual property. We, contrary to what Mr. Padden would suggest in his prepared statement, we support SYNDEX, we support nonduplication. We are a full, bona fide member of the communications community. We're not trying to run and hide and seek exclusion.

I think the difference that I would suggest is that, as the marketplace unfolds, some of the stripes on the pants change. I think Fox is a wonderful addition as a broadcast network, but I think in the context of this forum, they're a cable network. They are 17 or 18 hours of a satellite-distributed service that isn't available other

than on an exclusive basis to their distributor, and their distributor is not a broadcast outlet.

So, I think the distinctions that I would leave you with are that, first, we are covered under the act, and we need to have that reinforced. The tide in this Congress is for procompetition. If this kind of conclusion is reached, it would be a contradiction to the promotion of competition. It puts another hurdle in front of a competitor like ourselves at the most ill-timed possible event. We need to have that clarified, and we look forward to your support.

Thank you.

Mr. HUGHES. Thank you, Mr. Schmidt.

[The prepared statement of Mr. Schmidt follows:]

STATEMENT OF ROBERT L. SCHMIDT
PRESIDENT
WIRELESS CABLE ASSOCIATION

Mr. Chairman and Members of the Subcommittee.

Over fifteen years ago I appeared before this Subcommittee as President of the National Cable Television Association, the trade association of coaxial cable system operators. At that time I testified about the importance for every cable system to have a compulsory license to retransmit broadcast programming. Today, I appear as the President of the Wireless Cable Association to advance the same position. Regardless of the technology they employ, all cable systems must continue to be eligible for the compulsory license under Section 111(c) of the Copyright Act without disruption.

Without your help the wireless cable industry's recent rapid growth could be halted abruptly by an incredible, unnecessary, and utterly irrational decision by the United States Copyright Office. Unless wireless cable operators retain the use of the compulsory license which they have been enjoying and paying for over the last several years, wireless cable will fail to reach its full potential as an alternative to traditional coaxial cable providing consumers with a competitive lower price choice for subscription television services.

In 1976, the Copyright law was amended to establish a compulsory license for cable systems, i.e. systems making transmission "by wires, cables or other communications channels." Under this statutory language wireless cable systems, qualifying

as "other communications channels" have been filing with the Copyright Office appropriate notifications and payments. Back in 1986, the Copyright Office opened an inquiry to determine whether it was appropriate for wireless cable and other distributors of subscription television who were relying on the statutory language to continue to operate under the compulsory license. The Notice of Inquiry was released in 1986, and it has been more than four years now since the pleading cycle closed with respect to the right of wireless cable systems to enjoy the benefits of the Copyright Act.

The Wireless Cable Association has just learned that the Copyright Office has suddenly decided to move on this issue. Apparently it has concluded tentatively that wireless cable systems are not eligible for the compulsory license and is poised to issue a notice of rulemaking that proposes to bar wireless cable systems from continued use of the compulsory license. If the Copyright Office follows through on this threat, even by issuing a notice of its tentative decision, it will have a devastating impact on the future of the wireless cable industry.

In exercising its oversight jurisdiction over the Copyright Office I respectfully suggest that the Subcommittee explore three questions:

1. **Law**. How can the Copyright Office strain to ignore the clear statutory language of the Copyright Act and relevant judicial interpretations which establish wireless cable's eligibility to the compulsory license?

2. **Rationale**. What conceivable public policy is served by the Copyright Office reopening this issue in a way that contradicts every effort by the FCC and the Congress to stimulate competition and technological development in the video marketplace?

3. **Timing**. What is driving the Copyright Office's decision to abruptly move on a moribund inquiry and a stale and outdated record?

Law

Under Section 111(c) of the Copyright Act[1/], every

1/ Section 111(c) of the Act establishes a compulsory licensing program under which cable systems are permitted to make secondary transmissions of copyrighted works contingent on the filing of certain notices and statements and the payment of certain fees. The program was developed as a means of accommodating two sometimes conflicting federal policies: ensuring the broad public dissemination of broadcast programs, while at the same time protecting the rights of owners of copyrighted materials. Congress recognized "that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5704. Through the mechanism of the compulsory license, Congress was able to create a workable scheme for compensating copyright owners while protecting the public's interest in "a continuing supply of varied programming to viewers." Eastern Microwave, Inc. v. Doubledale Sports, Inc., 691 F.2d 125, 132 (2d Cir. 1982), (continued...)

"cable system" has a compulsory copyright license to retransmit the signals of television broadcast stations, so long as such retransmissions are permissible under the FCC's rules and so long as certain documents and license fees are filed periodically with the Copyright Office[2/]. As defined by the Copyright Act, however, the definition of "cable system" extends far beyond the traditional coaxial cable system. Rather, with Section 111(f) of the Copyright Act, Congress extended the compulsory license to any secondary transmissions "by wires, cables, or other communications channels." (emphasis added.)[3/]

1/(...continued)
1982), cert. denied, 459 U.S. 1226 (1983).

2/ As discussed more fully below, there is no issue as to whether wireless cable is permitted by the FCC to retransmit. See the FCC's Second Report, General Docket No. 89-88, released June 5, 1991, acknowledging the longstanding practice by wireless cable operators of retransmitting broadcast programming.

3/ The compulsory license provided for under Section 111(c) is only available to a "cable system." The term "cable system" is defined by the Act as:

> a facility located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service.

(continued...)

Wireless cable operations are "cable systems" within the definition of Section 111(f) of the Copyright Act.[4/] Wireless cable systems utilize super high frequency channels to transmit multiple channels of video programming from terrestrial transmitters to small antennas mounted on subscribers' rooftops. This technology was available and employed commercially on microwave channels well before Congress created the compulsory license for any secondary transmission "by wires, cables or other communications channels." The FCC has observed that "although wireless cable service resembles cable television service by virtue of the type of programming it provides as well as its multichannel character, it uses over-the-air-microwave radio channels rather than cable to deliver video material to subscribers." Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules, 5 FCC Rcd 6410 (1990).

From the customer's perspective, the secondary transmission service that is provided by a wireless cable system

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3/(...continued)
17 U.S.C. § 111(f) (1982) (emphasis added). The same definition appears in regulations promulgated by the Copyright Office. See 37 C.F.R. § 201.11(a)(3) (1986).

4/ In contrast, the backyard dish industry, which does not squarely fit within the definition, sought and obtained the compulsory license in separate legislation in 1988. See Satellite Home Viewer Act § 202(2), 17 U.S.C. § 119 (1991). That Congress passed such separate legislation reinforces the conclusion that the compulsory license should be available to all distributors of subscription television regardless of the distribution technology employed.

is identical to the service provided by a coaxial cable system: in each case, the subscriber gains access to an additional source of broadcast programming. Similarly, from an operational point of view, little distinguishes wireless cable from coaxial cable service. [See Diagram, Attachment A]. Each service makes passive secondary transmissions of signals from a centralized headend to subscribers, and each provides its subscribers with the equipment necessary to receive the signals in their homes. The only difference, ultimately, between wireless cable and coaxial cable services is that wireless cable connects its subscribers with the cable headend via microwave transmissions, rather than using the more expensive medium of coaxial cable.

This difference -- transmission by microwave versus transmission by strung or buried cable -- is a distinction without significance for copyright purposes. The plain language of the Act shows that Congress did not intend to condition eligibility for the compulsory licensing program on the type of "communications channels" used. Rather, the Act permits a system to avail itself of the compulsory license so long as it makes secondary transmissions "by wires, cables, or other communications channels." Section 111(f), which Congress cast in such broad terms, should not now be read to exclude wireless cable systems simply because they utilize transmission technologies present but not fully developed at the time that the

Act was enacted.[5/] "'When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of [its] basic purpose'" -- the promotion of "'broad public availability of literature, music, and the other arts.'" Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984), quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).[6/]

When viewed in light of the purposes of the Act as a whole, and the compulsory licensing program in particular, it is clear that wireless cable systems satisfy the spirit as well as

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5/ The staff of the Copyright Office has informally advised the Wireless Cable Association that it believes the phrase "other communications channels" was intended merely to extend the compulsory license to coaxial cable systems that utilize wireless technology to extend their signal into unwired areas. The flaw in that analysis is that such hybrid systems did not begin to develop until the mid-1980s. While the Wireless Cable Association believes that the compulsory license is available without regard to whether a system employs technology in place in 1976, it certainly would be a strained interpretation of the law that affords systems not in existence in 1976 access to the compulsory license while denying it to wireless cable operators employing technology that was used at that time.

6/ Cf. Hubbard Broadcasting, Inc. v. Southern Satellite System, Inc., 777 F.2d 393, 400 (8th Cir. 1985), petition for cert. filed (rejecting interpretation of Section 111 which, "if accepted, would largely freeze for Section 111 purposes both technological development and implementation . . . [and] would force both primary and secondary transmitters alike to forego available, economically feasible technology. We reject this stand still status quo oriented view of the compulsory licensing provisions."); Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d at 132 ("Interpretation of the [Copyright] Act must occur in the real world of telecommunications, not in a vacuum").

the letter of the statutory definition of "cable systems." Wireless cable, like coaxial cable, can be used to promote the wider dissemination of broadcast programs to the public. For wireless cable, as for coaxial cable, the crippling burden of individual negotiations with copyright owners would effectively bar the retransmission of broadcast programs. The difference in the transmission technologies used by each industry does not affect either the need for the compulsory license -- or the consequences of its denial.

The FCC has recently issued a Report and Order interpreting the phrase "cable system" as that phrase is utilized in the Cable Communications Policy Act of 1984. That interpretation of the Cable Act does not control the definition of "cable system" in the Copyright Act, which is significantly different from that in the 1984 Cable Act. Indeed, the Copyright Office itself makes just this point in the instructions for the official form used for making compulsory license fee payments. The instructions state: "A system that meets [the cable system definition in the Copyright Act] is considered a 'cable system' for copyright purposes, even if the FCC excludes it from being considered a 'cable system' because of . . . the nature of its secondary transmissions." (General Instructions, Form SA1-2, Page (ii).) We submit, however, that the FCC's analysis is certainly relevant, for it relies on the inclusion of a phrase in the Cable Act definition (which defines a "cable system" as using

"a set of closed transmission paths") that is noticeably absent from the Copyright Act. That Congress defined "cable system" more broadly in the Copyright Act -- as a system that makes secondary transmissions "by wires, cables, or other communications channels" -- supports the Wireless Cable Association's view that wireless cable operators are entitled to avail themselves of the compulsory license, regardless of whether the systems they operate are "cable systems" for purposes of the 1984 Cable Act.

Rationale

The Copyright Office would be hard pressed to develop any public policy grounds whatsoever for its current view of the Act. If indeed it issues a notice of rulemaking that tentatively concludes that wireless cable is not entitled to the compulsory license, the industry will be adversely affected by the loss of financing and face serious, immediate consequences.1/

It will also have a material adverse effect on both operators and consumers who rely on wireless cable for access to broadcast programming. Today, close to seventy-five wireless cable systems are operating across the country, serving hundreds of thousands of subscribers. [Attachment C]. Hundreds more are in development. Both Congress and the FCC have acknowledged that

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1/ Attachment B. (Letters documenting how the threat of a disruption in the use of the compulsory license will harm wireless cable operators.)

wireless cable represents a viable alternative to the coaxial cable monopoly, but that the wireless industry needs assured access to popular programming in order to effectively compete. Virtually every system operating today depends upon Section 111(c) to bring consumers local broadcast signals or popular superstations such as WTBS, WWOR and WGN. Indeed, while wireless cable has had to struggle to get equitable access to the non-broadcasting programming services, Section 111(c) has always assured wireless cable operators the same access to broadcast stations as the cable industry has long enjoyed. Without the compulsory license, wireless cable operators will have no choice but to discontinue offering those broadcast signals.

A study conducted in 1988 by the United States Senate Subcommittee on Antitrust, Monopolies and Business Rights of the Committee on the Judiciary confirmed that in order for wireless cable and other emerging technologies to effectively compete with wired cable, they must have access to the same sources of programming as consumers have come to expect from their cable systems.[8/] Whether served by wired or wireless cable, the

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8/ See also Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962, 5021-32 (1990); Statement of Alfred C. Sikes on FCC Cable Television Policies, Recommendations and Initiatives Before the Subcommittee on Communications, Committee on Commerce, Science, and Transportation, United States Senate, at 14 (Nov. 17, 1989) ("reasonable access to programming is an essential ingredient to facilities-based competition in the video services field"); "Balancing the (continued...)

consumer expects access to local broadcast stations, superstations and non-broadcast cable programming. A system that cannot meet those consumer expectations cannot compete in the marketplace.

While Congress and the FCC have struggled of late with the difficult issues associated with assuring new technologies fair access to the non-broadcast cable programming, they have not devoted attention to whether wireless cable can engage in secondary transmissions of broadcast signals on the same basis as wired cable systems. There has been no need; Congress assured that right when it drafted Section 111 of the Copyright Act in such a way that it is technology neutral.[2/] The basic purpose

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8/(...continued)
Power of Cable," Remarks of FCC Commissioner Sherrie P. Marshall before the Federal Communications Bar Association, at 6 (Mar. 7, 1990) ("Access to desirable programming at fair prices is the key to the competitive viability of these potential challengers to cable").

2/ Indeed, in the current legislative debate over retransmission consent proposals, the operating assumption is that all cable technologies including wireless cable have the compulsory license. S. 12, the Cable Television Consumer Protection Act of 1991, as passed out of the Senate Committee on Commerce, Science and Transportation, contains a retransmission consent provision stating that "no cable system or other multichannel video programming distributor" shall be able to retransmit the signal of a broadcast station without the authority of that station. S. 12, 102nd Cong., 1st Sess. § 15(a) (1991). A "multichannel video programming distributor" is defined as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service [i.e. wireless cable] a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for (continued...)

of the compulsory license is to protect the public's interest in access to a continuing supply of broadcast programming. Section 111 of the Copyright Act neatly accommodates the distribution of that programming by cable systems employing old and new technologies by extending the compulsory license beyond traditional cable systems.

Particularly in these times of rapid technological change, it is critical that the Copyright Office interpret the Copyright Act to promote innovation, rather than frustrate it. Wireless cable operators employ an innovative, cost effective new means of delivering video programming to the home, a means that offers consumers a competitive choice of cable services. At the same time that Congress and the FCC are encouraging wireless cable and similar system developers to employ new technologies to lower the cost to consumers of cable service, the Copyright Office should refrain from penalizing them for not using the costly wire technology that predominated when the Copyright Act was passed in 1976.

Timing

The fact is that, since the formal pleading cycle on this issue closed, there have been a myriad of developments that bear upon the issues before the Copyright Office. At that time,

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9/(...continued)
purchase, by subscribers or customers, multiple channels of video programming." S. 12, § 4(e).

there were just a handful of wireless cable systems operating in the United States and most parties could only speculate as to how the industry would develop. Now, however, there are operating wireless cable systems dotted across the country, serving hundreds of thousands of subscribers in their homes. Issues that consumed a great deal of attention during the 1986-87 pleading cycle are now largely moot.[10/]

Since the record in this proceeding closed, there has been a groundswell of support among the nation's policymakers for the emergence of the wireless cable systems as a source of competition to the coaxial cable monopoly. Last session, the House of Representatives passed legislation that would have promoted the development of wireless cable and other competitive alternatives to traditional coaxial cable, and the Senate Commerce Committee reported similar legislation. This session, both houses of Congress are actively addressing legislative proposals that are designed to aid emerging distribution

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10/ For example, a great deal of attention was paid in the Copyright Office inquiry record of 1986-87 over whether "bulk billing" practices by wireless cable operators would deprive those operators of their right to the compulsory license. Since then, however, the wireless cable industry has embraced fully addressable technology and is aggressively marketed to single family homes. As a result, the number of "bulk-billing" situations has diminished drastically. Indeed, although no statistics are readily available, the Wireless Cable Association suspects that today coaxial cable operators employ "bulk-billing" strategies at least as frequently as their wireless brethren.

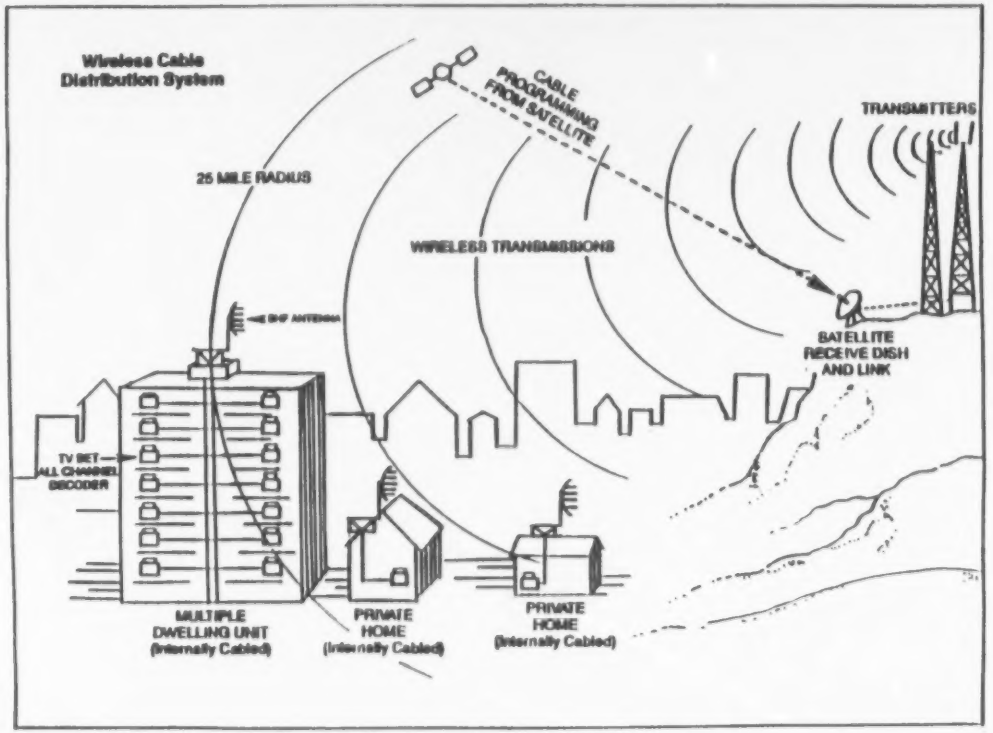
technologies such as wireless cable. Meanwhile, the FCC has also taken an active role in promoting the development of wireless cable. In a Report it submitted to Congress last summer, the FCC urged Congress to make several amendments to the Communications Act of 1934 designed to boost the competitive prospects of wireless cable. Last October, the FCC made a series of major revisions to the rules that govern wireless cable for the express purpose of promoting the development of competition to wire-based cable systems, and further rule changes are anticipated later this year.

The FCC has also rendered a series of decisions that impact many of the legal arguments advanced by the parties in connection with the Copyright Office's early consideration of the Notice of Inquiry. For example, several parties suggested during the 1986-87 pleading cycle that wireless cable systems could not avail themselves of the compulsory license because the FCC did not expressly address the secondary transmission of broadcast programming over the wireless cable spectrum. Since the pleading cycle closed, the Wireless Cable Association and others have submitted numerous pleadings to the FCC noting that wireless cable systems retransmit broadcast programming. Indeed, the FCC recently released a Second Report in its General Docket No. 89-88 that not only acknowledged that wireless cable systems retransmit broadcast superstation programming, but explored in depth the rates, terms and conditions pursuant to which that programming is

provided. That the FCC continues to allow wireless cable operators to engage in secondary transmissions confirms what the wireless industry has been saying all along: such retransmissions are, and have long been, permissible under the FCC's rules.

The Wireless Cable Association urges the Subcommittee to take such steps as are necessary to assure that the implementation of the compulsory license under Section 111(c) by the Copyright Office is supported by law, reflects the current state of the video marketplace, and is consistent with the efforts by Congress and the FCC to provide consumers access to programming through alternative technologies such as wireless cable. Accordingly, we urge the Subcommittee to clarify congressional intent by initiating legislative action which confirms the right of wireless cable to the compulsory license. We request that the Subcommittee exercise its jurisdiction to prevent any disruption of the status quo until Congress has made a definitive statement on this issue.

Robert L. Schmidt
President
Wireless Cable Association


Wireless Cable
Distribution System
CABLE
PROGRAMMING
FROM SATELLITE
TRANSMITTERS
25 MILE RADIUS
WIRELESS TRANSMISSIONS
SATELLITE
RECEIVE DISH
AND LINK
TV SET—
ALL CHANNEL
DECODER
MULTIPLE
DWELLING UNIT
(Internally Cabled)
PRIVATE
HOME
(Internally Cabled)
PRIVATE
HOME
(Internally Cabled)

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ATTACHMENT B

OMNI MICROWAVE TELEVISION

4669 MAIN ST. • BRIDGEPORT • CONNECTICUT • 06606
TEL 203-371-2660 • FAX 203-371-6516

The Honorable William J. Hughes, Chair
House Judiciary Subcommittee on
Intellectual Property and Judicial Administration
207 Cannon House Office Building
Washington D.C. 20515

July 9, 1991

Dear Mr. Hughes:

Omni Microwave Television is a company that makes investments in wireless cable TV, the new competitor to conventional cable TV. In the last three years, Omni has made financial commitments of over $17 million to this new industry.

Omni's first system, in Tucson Arizona, launched two weeks ago. We are providing cable programming with better service, more reliability, and lower prices than our cable competitors. Finally, after years of work, unavailability of programming, and skepticism from larger media and financial interests, we are about to fulfill the consumer, legislative, and FCC mandate for a choice in TV program services. Similar systems are to launch in Houston, Minneapolis, St. Louis, Chicago, Baltimore, and Kansas City.

Now, just as we are beginning, we find our ability to compete in the marketplace threatened. We have recently become aware that the Copyright Office is considering issuance of a rulemaking that would state that wireless cable systems cannot exercise the same compulsory license rights as cable television systems. This regulation would be in direct conflict of the Copyright Act of 1976, which specifies "other communication channels" besides cable for the compulsory license. The rulemaking would kill the new wireless industry in its infancy.

In our very first system, we carry 12 broadcast signals, including superstations that the cable companies in the area removed from their systems to save money. The removal of these stations by the cable companies prompted a wave of consumer complaints. Now, we, their competition, are carrying these channels. But instead of competing on a level playing field, the cable industry has chosen to lobby the Copyright Office to remove our ability to carry these stations. Our cable competition would then trumpet its "exclusive" right as "granted by Congress" to

carry this programming, and continue to charge monopoly rates.

Even if the Copyright Office "merely" issues a Notice of Proposed Rulemaking against wireless, the effect could chill the availability of further finance. The finance for the wireless cable industry has only recently become available, and is still nowhere near the amount available to conventional cable.

Copyright issues are notoriously long-lived. This particular docket has been in existance over three years already. To have such a proposed rule hanging over the industry like a sword, would fatally deter many potential investors, and would provide much cheer to the cable TV industry. As our company attempts to raise third party finance for the cities listed above, this is a crucial issue. Typical finance agreements require us to provide legal opinion that no government rule is pending that would adversely affect our industry. No such opinions could be provided with an adverse NPRM hanging over us, and the Copyright Office would have stymied the birth of cable competition, without ever having to actually rule on the issue.

All this is in addition to the fact that the rulemaking, if issued, would simply be wrong. Microwave distribution services were in existance at the time of the Copyright Act, and are clearly meant to be included.

We cannot believe these actions are in accord with the intent of Congress. The Copyright Office, an arm of Congress, would seem to be acting directly to help the cable industry preserve its de-facto monopoly.

This is an emergency matter for our industry and for TV viewers. We ask that you provide whatever assistance you can in contacting Ralph Oman at the Copyright Office and stopping the issuance of an erroneous and harmful Notice of Proposed Rulemaking.

Thank you for your support.

Very truly yours,

Matthew Oristano
President

cc: Committee Members

BCI
CAPITAL FOR GROWTH

Theodore T. Horton, Jr.
Managing Director

July 9, 1991

Robert L. Schmidt
President
The Wireless Cable Association, Inc.
2000 L. Street, N.W., Suite 702
Washington, DC 20036

FAX: (202) 452-0041

Dear Bob:

I am writing to express my concern over the potential impact on the future of the Wireless Cable Industry should the Copyright Office so much as issue a notice proposing to exclude wireless cable operators from enjoying the benefits of the compulsory license under Section 111 of the Copyright Act.

As you know, BCI Growth, a $135 million mezzanine fund, has made significant investments in the Wireless Cable Industry, in large part because the industry has of late substantially resolved its historic difficulties in securing access to programming. In our view, no cable service, be it wired or wireless, will survive in the increasingly competitive marketplace without the ability to provide subscribers access to the programming they demand. Were the Copyright Office to formally suggest that there is a serious risk of the Wireless Cable Industry losing the ability to retransmit local and superstation broadcast signals, it would be extremely difficult to justify the additional investments in the wireless cable industry we are analyzing at this moment. We believe that the public demands of cable systems, whether wired or wireless, access not only to local broadcasters, but to the popular superstations such as WTBS, WWOR and WGN. Without an ability to offer that broadcast programming to subscribers, we do not expect that wireless cable would remain attractive to either the general public or more importantly, to us as investors.

Very truly yours,

Theodore T. Horton, Jr.

ATTACHMENT C

US Wireless Cable Operations, 2/91

(Operating Systems or Under Construction in 1991)

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WIRELESS CABLE ASSOCIATION, INC.

2000 L Street, NW * Suite 702 * Washington, DC 20036 *
(202) 452-7823 * Fax (202) 223-1288 *

US WIRELESS CABLE OPERATIONS, I/91*

Albany, NY	Capital Wireless Corp., 518/899-2222
Atlanta, GA	R & R Technologies, 404/449-0955
Austin, TX	CableMaxx, 512/346-6299
Bakersfield, CA	Valley Wireless Cable, 805/325-8798
Bartley, NE	Southwest Telecom, 308/285-3880
Bath/Aberdeen, SD	Northern Rural Cable TV, 605/225-0310
Bay City/Saginaw, MI	Microcom, Inc., 517/684-7160
Billings, MT	TV-3, 719/540-9198
Champaign/Urbana, IL	People's Choice, 217/893-8730
Chicago, IL	People's Choice, 217/893-8730
Clear Lake, SD	HD Electric, 605/874-2171
Cleveland, OH	MetroTen, 216/662-7125
Colmon, SD	Sioux Valley Rural Telecom, 605/534-3241
Colorado Springs, CO	American Telecasting, 719/632-7014
Corpus Christi, TX	Omnivision, 512/289-0303
Denver, CO	TVCN, 303/751-2900
Desmet, SD	Kingsbury Electric, 605/886-5706
Detroit, MI	Wireless Cable of Detroit, 313/356-6901
Everly, IA	Evertek, 712/834-2255
Fairfax, VA	Capital Connection, 703/323-3849
Ft. Wayne, IN	Choice TV, 219/482-2020
Houston, TX	People's Choice, 217/892-9300
Huntsville/Athens, AL	Madison Communications, 205/536-3724
Huron, SD	Beadle Electric, 605/352-8591
Ipswich, SD	FEM Electric, 605/426-6891
Kearney, NE	Cable USA, 308/234-6428
Kildeer, ND	Consolidated Telephone Coop, 701/225-6061
Knoxville, TN	Capital Wireless, 518/899-2222
Las Cruces, NM	TV West, 505/293-2566
Lefore, ND	Consolidated Telephone Coop, 701/225-6061

* Operating systems or under construction in 1991

Madison, WI	White Knight Media, 608/271-6999
Milbank, SD	Whetstone Valley Electric, 605/432-5331
Milwaukee, WI	Milwaukee Entertainment, 414/277-4290
Minneapolis, MN	People's Choice, 217/892-9300
Mitchell, SD	Communications Enterprises, 605/796-4411
Myrtle Beach, SC	Mitchell Communications, 803/249-7522
New York, NY	Microband Wireless Cable, 201/227-8700
North Platte, NE	Southwest Telecomm, 308/285-3880
Oklahoma City, OK	Antenna Vision, 405/236-8400
Oshkosh, NE	Southwest Telecom, 308/285-3880
Palisade, NE	Southwest Telecom, 308/285-3880
Philadelphia, PA	ACS Enterprises, Inc., 215/245-4900
Ray, ND	Northwest Comm. Corp., 701/568-3331
Redfield, SD	Spink Electric, 605/472-0380
Redmond, OR	Centralvision, 503/923-0518
Reno, NV	Quadravision, 702/829-7796
Riverside/San Bernadino, CA	Cross Country, 202/667-0001
Roma, TX	Teleview, 512/499-2859
Rutland, VT	Satellite Signals of New England, 802/775-4112
Sacramento, CA	Pacific West Cable TV, 916/928-2500
Salina, KS	Mitchell Communications, 803/249-7522
San Antonio, TX	Cable Maxx, 512/345-1115
San Francisco, CA	Gulf American Wireless, 415/571-9535
San Luis Obispo, CA	Mitchell Communications, 803/249-7522
San Juan, PR	Telecable of Puerto Rico, 809/722-7815
Sarasota, FL	Airborne Cable TV, 803/923-8100
Sioux Falls, SD	Family Entertainment Network, 605/996-1300
Spokane, WA	Skyline Entertainment Network, 509/624-7500
St. Louis, MO	People's Choice TV, 217/892-9300
Tampa, FL	WCTV, 813/855-6505
Union City, TN	Union City Microvision, 901/885-4922
Washington, DC	Wireless Cable of Washington, 301/984-3075
Waterloo, IA	Wireless Cable, 319/234-0921
Watertown, SD	Northeast TV Cooperative, 605/886-5706
Webster, SD	Lake Region Electric, 605/345-3379
Wichita, KS	Multimedia Cablevision, 316/262-4270
Windom, MN	Family Entertainment Network, 605/996-1200
Wray, CO	Southwest Telecom, 308/285-3880
Yakima, WA	Northwest Satellite Network, 509/248-9038

ADDENDUM TO ATTACHMENT B

THREE SIXTY CORP.
[redacted]

July 9, 1991

Mr. Robert Schmidt, President
Wireless Cable Association
2000 L Street, N.W., Suite 702
Washington, DC 20036

Dear Robert:

I understand you are preparing to testify on the subject of New Technologies before the House Subcommittee on Intellectual Property and Financial Administration. I am certain that you will ably portray the current state-of-the-art technology in Wireless - and the continued need for Wireless Cable operators to remain competitive in the marketplace by way of access to programming.

The issue that I would like to have brought to the attention of the Subcommittee is that of the applicability of the compulsory license/copyright regulation to our industry.

Most Wireless Cable operators, including my own company's system (TechniVision) in Corpus Christi, Texas, carry local and distant independent stations as part of the offering to subscribers. Access to broadcast programming is as valuable to the Wireless Cable customer as it is to the coaxial cable customer. The inability to access broadcast programs would place the Wireless Industry at a serious competitive disadvantage vis-a-vis the local cable system in serving customers' desires. TechniVision has paid its appropriate copyright fees since its launch in Texas. This is based on The Copyright Act's definition of a "cable system" for purposes of copyright/compulsory license as well as the Copyright Office's own definitions and admonishments, copies of which I have attached to this letter.

I understand there may be other interpretations of the language of (PL 94-553) that would exclude Wireless Cable systems from the definition of "cable system". If this position is proposed by the Government, Wireless Cable systems, after having recently solved some major program access issues, will suffer a set-back in their quest to become competitive with cable systems in their markets. In Corpus Christ, Texas, absent the compulsory license, TechniVision would have to delete local broadcast channels from the Wireless System plus the distant stations of WTBS, WGN and Fox from its lineup.

While we currently serve 12% of the market, with these broadcast programs on our system, I believe there would be a significant reduction in that percentage, probably dropping us below the 10% threshold established recently by the FCC in its new Effective Competition definition. Thus the goal of providing effective competition would be thwarted.

I cannot imagine that anyone, except our competitors, would be opposed to what this industry has long assumed to be the proper reading of the language of (PL 94-553), an assumption never contradicted by the Copyright Office which has been accepting our industry's royalty fees for years. Perhaps a legislature clarification is the ultimate answer. In the meantime any published interpretation by a governmental source that the compulsory license does not apply to Wireless Cable would be harmful and would move our Industry backward. I hope that you can reflect the seriousness of my concerns to the Committee on Wednesday.

Thanks again.

Very truly yours,

Robert D. Bilodeau

RDB/mmo

Mr. HUGHES. Let me just, if I might, pick up on your statement that you're full members of the telecommunications industry or community. Mr. Padden makes the point that there is an anomaly, that wireless operators are not subject to the network nonduplication and syndicated exclusivity rules of the FCC. What's your response to that? Should you be?

Mr. SCHMIDT. I fully subscribe to the premise that we are retransmitting other people's product and we should abide by all of the tenets of responsibility that relate to that.

Mr. HUGHES. Mr. Padden also makes a point that we should be moving to a more market-oriented regime. What does the rest of the panel have to say about that? Should we be looking to let more market forces, as opposed to the present compulsory licensure system? Mr. Schmidt.

Mr. SCHMIDT. Again, maybe because I have a historical perspective on this, I sat at this table in a different room 15, 16 years ago on behalf of the cable industry, and we talked about the necessity for compulsory license as a jumpstart to promote the development of diversity in programming. I still think that principle applies as you now look at the marketplace because it's a cable marketplace today. Cable's monopoly today rapidly has put a tremendous burden on the public, and the public likes the product, but, unfortunately, needs to have a competitive environment to ensure that they are the ultimate beneficiary of this process. You cannot have a pure marketplace as a theoretical premise without ensuring that the development of other competitive forces can "get those equivalent jumpstarts" that cable got.

I can tell you, if it hadn't been for the broadcast compulsory license in 1976, there would not be a cable industry today, because that necessitated the economics to go out and create those new programming services. I maintain that from our own perspective we will do the same thing. We're very interested to have a unique product. We're not interested in just being a "me-too" service.

Mr. HUGHES. Mr. Treeman, or does anybody else want to voice an opinion?

Mr. TREEMAN. Well, I think that begs a definition of the marketplace. We feel compulsory license has been instrumental in delivering a lot of very important programming to people. Congress, in its wisdom, made the decision to provide that programming. To us, that's the marketplace. The marketplace is what consumers have received as a result of congressional action and the assurance that they continue to receive that.

Mr. HUGHES. Mr. Paul.

Mr. PAUL. Mr. Chairman, I think that there is a—and I'm speaking as a person now who has been on both sides of this issue, if you will——

Mr. HUGHES. How about today?

Mr. PAUL. Not today, no.

[Laughter.]

Mr. PAUL. There is a very fine balance—and this is from my perspective. There is a very fine balance that I think this subcommittee has been able to achieve, through the 1976 and certainly through the 1988 acts, between what the rights of the copyright

owners are and what the rights would be of all television consumers who are looking for diversity and choice in their programming.

I think what should be of particular interest to the subcommittee is the fact that the negotiations for the satellite rates for the period 1993–94 were initiated just this month, as a matter of fact. Approximately 2 weeks ago, the CRT gave notice that it was time to begin the negotiations, and the parties have been responding.

If no agreement is reached by the end of the year, by December 31, then the matter is submitted to compulsory arbitration under the auspices of the Copyright Royalty Tribunal. So, I think this is going to be a unique experiment, if you want to call it that, or a very good test of whether there can be a voluntary license negotiated with a compulsory arbitration mechanism as a backstop. In that way, I think the interest of both sides can be fully——

Mr. HUGHES. So we'll see it tested, we'll see the concept tested to some extent——

Mr. PAUL. Yes, that's correct.

Mr. HUGHES. That's the bottom line.

Mr. PAUL. Right.

Mr. HUGHES. How about you, Mr. Phillips?

Mr. PHILLIPS. Mr. Chairman, I'm a little bit wary of that test because as we sit here today, as Mr. Schmidt said, the wireless cable industry—and I would say the satellite industry—needs a jumpstart. We need to get these industries going for a couple of purposes.

First of all, to extend the benefits of this program to rural viewers who live beyond the reach of hardwire cable or an off-air signal. That's been our whole mission and purpose. Today we still have many, 10 and 12 million consumers, who have no access. This is the way to get it to them.

In addition to that, if we're going to create any competition to cable, which now enjoys full benefits of the compulsory license, we have to have other technologies get this jumpstart. So, today as we're before you, we have 50 to 60 percent piracy; we have pricing that's way out of line for the satellite carriage, and you have set up the cost of the product as a fixed rate and we can't get the benefit of that flowed through to the consumer or the marketplace.

So, I'm wary of that test, and I support the compulsory license and the need to help our industry with that.

Mr. HUGHES. Mr. Treeman, insofar as discriminatory pricing, what do you say about giving distributors standing to sue?

Mr. TREEMAN. Well, I'd first like to make the point that there is a difference between the TBO and the cable business. If I walk into my Chevy dealer with a Chrysler motor under my hand and say, "Will you sell me a Chevy without the motor?" and he doesn't discount the price of the motor, I'm not sure I can accuse him of discriminatory pricing.

There were certain things that Superstar Connection, which is a sister company to United Video, had to do to get into the home satellite dish business. In doing that, they made investments in the business. It's kind of like designing a motor for a car.

I think in a heads-up comparison of what it takes to do business, I think we can stand that scrutiny. So, it's just a question of who does it. Right now there are regulatory proceedings to do it. Since

that's a little bit different part of the business, I'd like to duck getting into any more details than that.

Mr. HUGHES. Mr. Phillips.

Mr. PHILLIPS. May I respond?

Mr. HUGHES. Sure.

Mr. PHILLIPS. We're not here today to talk about cars or motors. We're here today to talk about satellite signals that are delivered by United Video. I just want the committee to note that we're talking about the same satellite signal that goes to cable, that goes to the home dish market. They use the same satellite transponder. They use the same uplink facility. They use the same scrambling system.

So, I don't see any difference that justifies the kind of price discrimination that the FCC has uncovered.

Mr. HUGHES. See, that's the problem, Mr. Treeman. Our whole system is based upon checks and balances. That's what works so well with our present compulsory license system which you support. But, in this instance, copyright owners really have very little incentive to sue for predatory pricing. So why not give the individual or the firm that's been discriminated against standing to sue? We do that in every instance, every case I can think of. Yet, in this instance those who are the victims of discrimination have no standing to sue, to challenge predatory pricing in the marketplace. What's wrong with giving them the same right that we accord to everybody else?

Mr. TREEMAN As long as there is an objective comparison made of the differences between the two markets, we have no objection whatsoever.

Mr. HUGHES. I think that's responsive and responsible. Thank you.

The gentleman from California.

Mr. MOORHEAD. Thank you, Mr. Chairman.

Mr. Schmidt, you were one of those who negotiated with Jack Valenti and others originally on the formation of the Copyright Tribunal and this fund that we're discussing today. It must seem strange now to be fighting for a new industry to keep under that program.

What would happen to the money that you've already paid into the tribunal if it were ruled that you really didn't belong in it? Would you get that money back or what would be done with it?

Mr. SCHMIDT. That would be a lawyer's dream, as we say.

[Laughter.]

Mr. SCHMIDT. I don't have a good answer to that, but I'd assume that they'd have some accounting processes that would separate those funds so that the parties in interest would be refunded.

Mr. MOORHEAD. Basically, what would be the effect on your industry if you didn't have that compulsory license?

Mr. SCHMIDT. Well, Congressman, let me describe it to you this way: technology is not what people buy. People buy programs, whether it's name-brand products of the networks or it's the specific programming services that are on the satellite. I think the bottom line is that if the idea, the premise under which we're operating is to develop competition, you have just cut out the ability to compete.

Until 3 years ago when the hearings began in the Congress about alternative distribution systems having access to satellite programming, forget about the broadcast programming because that was an assumption that everybody made was available, we had no business. We now have 70-plus operating systems and 300,000-plus subscribers, and in my prediction we'll have another million subscribers very quickly. It's programming.

We're not looking for a free lunch. We believe that we can do a lot for broadcasters. In fact, I say, half facetiously, we're their newest best friend, because if the broadcaster is going to have an opportunity for its future, and I look at this report that came out of the FCC last week, and if I owned stock in broadcasting, I'd be on the sell side pretty fast if they say that the broadcasters are going to be dying in the next few decades. I don't believe that, but I really believe that the marketplace by definition says there have to be two or more providers in a marketplace to have a marketplace.

If it's cable's marketplace with 60-plus percent of the homes on cable and you're a disenchanted consumer, for whatever reason—you don't like the service, they don't answer the phone, or the price is too high—you don't have any alternative today other than to put a dish in your backyard. In many jurisdictions that's a violation of code.

So, if you're going to have an alternative market where you, as a consumer, can go because you've been abused by your present provider, then you've got to have product. I maintain that in our instance we give the broadcasters some value now, because we don't have as many channels as the cable operator. So we want to have a very friendly relationship with our consumer. So we put those channels where possible in the system. We give them their channel number that they fight with cable so hard about. As I say, we're their newest best friend.

I also believe in the future—this is an idea I'm just playing with right now, and I'd appreciate this committee's interest, if you have an interest in it—if the broadcasters have to find alternative revenue sources in its future, other than advertising-supported revenue, then we can provide that for them because we have an addressable technology. We can do the pay-for-view that they want to do. If CBS wants to create CBS 2 or ABC 2, we can provide that alternative to the home. Again, I think we're going to see a change in the marketplace, but it's cable's marketplace. Don't ever underestimate that. They are the major player now.

When I walked into this committee 16 years ago, we were the infant industry as the cable industry. The shoe is on the other foot. All the leverage is in cable's hands now. Broadcasters don't like that.

Mr. MOORHEAD. Are you strictly in competition with cable or are you supplemental to it? In other words, are you primarily in areas where cable is not located or do you compete directly with cable in most of your areas?

Mr. SCHMIDT. Well, let me try to answer that as a businessman. In addition to running the trade association, I am a businessman. I am building wireless systems for both inside the United States and outside the United States.

I'll make a business decision in the marketplace. If there's a huge bear there whose name is "cable," I'm not going to wake him up and get him angry at me. So I might start out "serving" that underserved part of the market, but if the consumer comes to me who is disenchanted and says, "I want to take your service," I'm not going to turn them down.

Mr. MOORHEAD. So, to some extent, you are in competition, with cable?

Mr. SCHMIDT. I think the answer is I really believe that we are cable's newest best friend; they just haven't figured it out yet.

[Laughter.]

Mr. SCHMIDT. And the reason we are, Congressman, is because if competition is going to be mandated by this Congress—and I believe you are going to mandate competition—who do you want to have as your competitor, somebody whose name ends in "T&T," because they will come and eat your lunch? I really think the public wants to have competition, not another monopoly replacing that monopoly.

Mr. MOORHEAD. Let me ask another question, though. You know, there's been a lot of controversy about compulsory license, and so forth, and the broadcasters, of course, are in a position where they say that a lot of the revenue that they would normally get is going to advertising on cable and to other systems, and so forth.

If cable didn't have the compulsory license either, would it be as damaging to you as it is with them having it and you not having it?

Mr. SCHMIDT. The answer is no, because, again, one of the hidden agendas in retransmission consent that I think you have to be very mindful of is that if retransmission consent becomes the law, and I'm a cable operator in the market, you will bet your "bippy" that I'm going to get exclusivity on that product. So, I am not going to give all the consumers access to that product, or I'm going to make all those consumers come on my system.

So, I think there are other aspects of this that you can't just gloss over right now. I think the issue is a very volatile issue. Again, I think a marketplace is possible, but not sort of throwing everybody in the middle of the pool and see who's going to sink or swim. I think you, as a public policymaker, want the consumer to be the beneficiary of this process, and the only way the consumer is going to be a beneficiary is if there are two or more providers.

Now last year there was a lot of excitement here about DBS, and we were going to have sky cable; it was around the corner. Whoosh. They're off the charts now. What happened? Because the economics of that process are so very, very demanding that you cannot get into business unless you have all those pieces laid out in front of you. When this Congress didn't pass that cable law last year, they went away.

Mr. MOORHEAD. My time is up.

Mr. HUGHES. The gentleman from Virginia.

Mr. BOUCHER. Thank you very much, Mr. Chairman. I have just a couple of questions for each of the witnesses here.

Mr. Phillips, let me start with you. The law seems to be settled, I think we all agree, that with regard to price discrimination under the Home Satellite Viewers Act, the only party that has standing

to file suit is a copyright holder. You as a third-party packager do not have that standing.

My first question is: What effort have you made, and what has been the result of that effort, to have the copyright holders file suit with respect to the price discrimination the FCC now says exists?

Mr. PHILLIPS. We have contacted the Motion Picture Association and visited with them, and we have visited with representatives of the networks as well, about their interest in such a discrimination suit. For example, while the MPAA finds it very disturbing that we've been charged these kinds of rates, and they perhaps agree with us personally that it's a shame, they don't really find any interest in bringing an action to stop it. The MPAA's words to us were that "We have no interest in the copyright law. We don't agree with the policy of it necessarily, and so we're not inclined to bring any suits."

Mr. BOUCHER. So, those efforts have not been fruitful?

Mr. PHILLIPS. That's correct.

Mr. BOUCHER. Another question that may be raised in the event that this committee attempts to provide standing to sue for third-party packagers who are injured by that pattern of conduct is that such a provision may be unprecedented in the law. I'm vaguely aware of some precedents that exist where noncopyright holders have been given the right to enforce a remedy for injuries within a copyright context. Can you provide some specific examples to us? Do you have some precedents for us for that?

Mr. PHILLIPS. Yes, Congressman. We have looked at the Copyright Act, and particularly section 501, which is the primary infringement section. In addition to the remedies that are given to the copyright holder for infringement, there seem to be two examples where the remedy has been given to a noncopyright holder. Section 501(d) specifically would give a right to a local broadcaster for an infringement action in the event that there are altered signals that come into that broadcaster's territory. So he would have standing to bring an action even though he's not the copyright holder.

Under 501(e), which was part of the Satellite Home Viewer Act, the network stations were given legal or beneficial ownership of the copyright for the purposes of bringing a copyright suit for infringement in the event that the restricted area provision is violated by the satellite carrier.

Mr. BOUCHER. So, if we were to give you that statutory right, we would not be acting in an unprecedented way? That has happened before?

Mr. PHILLIPS. Yes, I believe that's true. I think that as this committee created or this law creates a condition on the license, all you're doing is allowing us to stand in the shoes of the copyright owner to enforce the license or the condition on the license.

Mr. BOUCHER. The greater injury really is to you, not the copyright holder?

Mr. PHILLIPS. That's correct.

Mr. BOUCHER. OK. Thank you very much.

Mr. Paul, you have stated in your testimony that the SBCA is opposed to the retransmission consent concept because specifically when the compulsory license or the blanket license that's provided

in the Home Satellite Viewer Act expires several years down the road, 1994 or upon renegotiation at some future time, that your industry then would have to pay two fees and be involved in two negotiations, one of those negotiations with copyright holders and another with the broadcast entity that you're uplinking and distributing.

Now in the event that we, through a statutory enactment or through a successful negotiation, either way, witness a continuation of the license contained in that 1988 act, you're really then not injured, are you? You are then in the same position as a cable operator, assuming, of course, that a retransmission consent is generally enacted?

Mr. PAUL. I think basically that's right, Mr. Boucher. I think we've got to go back to something that Mr. Schmidt said: that we're all here today really for one purpose and that's to make sure that consumers get television programming, and that technologies such as ours, or perhaps such as Mr. Schmidt's, and as cable's has been from the beginning—a license being in place at least makes sure that there's going to be some facilitating mechanism for the programming to get from where it originates to the consumer itself. Now along the way, of course, we pay the necessary copyright fees to the people who created that programming, and that's fair, and that's the way the system should work.

We are concerned that there are other new procedures or processes that are interjected into this chain of events, and this chain, as I said in the beginning, was something that this subcommittee has been nurturing for 15 years. It's been fine-tuned to a point where it works pretty well.

We would be very leery of what something new like this would do to this fine-tuned engine that's already up and running and what effect it would have on the process by the time it gets to the consumer. The question is: Will that program be available or not be available to the consumers that we're trying to serve?

Mr. BOUCHER. As a practical matter, though, the only new requirement on you that a transmission consent provision would provide is the need to negotiate with the broadcaster whose signals you uplink?

Mr. PAUL. At that point, there would be a second negotiation, yes, and we would still run the risk that, even though we had the copyright license in place, which is the 1988 license—the broadcasters still would have the power to say no or to make the rates so unbearable that the cost to the consumer would be driven up.

Mr. BOUCHER. But, it doesn't put you in a position significantly different from the cable operator, if your license is extended and if a transmission consent is generally applied? You'd be on fairly equal footing, would you not?

Mr. PAUL. Except for the fact that, if you are talking about local retransmission rights, which is what retransmission consent involves when you're talking about a cable system, the copyright that a local cable system pays is virtually nil for all intents and purposes.

Mr. BOUCHER. But, you see, that wouldn't change. What I'm suggesting is an extension of your license so that you would pay in the future the same copyright that you pay today; the cable industry

would pay in the future the same copyright it pays today. Those factors don't change. The only thing that changes is that a retransmission consent provision would be put in place for both of you. How would you not be on equal terms?

Mr. PAUL. If cable is negotiating for the carriage of a local signal, not a distant signal for which it pays a copyright which is in the law, if it's paying for a local signal, it would pay whatever the compensation that is demanded for consent, but the copyright for that local signal is virtually nonexistent because that's not really what they're putting into the copyright pool. What's going into the copyright pool are their payments for distant signals.

So, you can say that they are paying maybe one or one-plus to a broadcaster in terms of consent plus copyright, but the satellite industry would be paying one-plus-one. He would still be paying a full copyright fee in addition to whatever the compensation would be for retransmission consent.

So, in terms of payments, it is not the same thing, no, sir.

Mr. BOUCHER. All right. I want to examine your answer in greater detail. I'll give you the deference of suggesting that there may be a difference here. I'll have to say that personally I fail to see it. So I would like to look at that answer in some greater detail. My conclusion still is that you're really on the same terms as the cable industry. We can have further discussions on that.

Mr. Schmidt—I know my time is almost up—let me just briefly ask this question and ask you for a brief answer. Tell me this: What would really happen to your industry today if you didn't have access to the cable compulsory license? What would happen to you?

Mr. SCHMIDT. The name of this industry is programming. If we don't have access to compulsory license, we have probably a significant blow at the most ill-timed opportunity to make us a competitive player.

Mr. BOUCHER. Is it practical for you to go out and negotiate with every copyright holder and get the clearances necessary to air those programs in the absence of the compulsory license?

Mr. SCHMIDT. Absolutely not.

Mr. BOUCHER. Thank you, sir.

Mr. Chairman, that's all I have.

Mr. HUGHES. I thank the gentleman.

We have about 4 minutes to catch a vote. Without objection, I'm going to put into the record a letter from Fritz Attaway of the Motion Picture Association.

[The letter from Mr. Attaway appears in the appendix.]

Mr. HUGHES. Mr. Padden, I didn't give you an opportunity to respond to——

Mr. PADDEN. I'm doing just fine, Mr. Chairman.

[Laughter.]

Mr. HUGHES. All right. That concludes the testimony. The panel has been very, very helpful to us on a very difficult, very complex issue. We appreciate your contributions today.

That concludes the testimony today. The subcommittee stands adjourned.

[Whereupon, at 12:13 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING

MOTION PICTURE ASSOCIATION
OF AMERICA, INC.
1600 EYE STREET, NORTHWEST
WASHINGTON, D.C. 20006
(202) 293-1966

FRITZ E. ATTAWAY
SENIOR VICE PRESIDENT
FOR GOVERNMENT RELATIONS

July 10, 1991

The Honorable Bill Hughes
341 Cannon House Office Building
Washington, D.C. 20510-3002

Dear Congressman Hughes:

Recently the Copyright Royalty Tribunal ("CRT") determined that network program owners are entitled to share in the satellite carrier royalty fund under 17 U.S.C. Section 119. 56 Fed. Reg. 20,414 (May 3, 1991). This determination was based on a reading of Section 119(b)(3) that was inconsistent with the overall structure of Section 119 and congressional intent in establishing the satellite carrier compulsory license.

The CRT relied on the language of Section 119(b)(3) which states that satellite carrier royalties shall be distributed "to those copyright owners whose works were included in a secondary transmission for private home viewing made by a satellite carrier." Because that language does not expressly exclude network program owners from distribution, the CRT concluded they are entitled to seek satellite carrier royalties. 56 Fed. Reg. at 20,416. In reaching its conclusion the CRT overlooked the history and structure of Section 119 as a whole and chose to ignore "the plain and clear language of the House Energy and Commerce Committee Report which states that network program owners shall not be eligible for satellite carrier royalty fees." Id.

Looking solely at the language of Section 119(b)(3), as the CRT did, does not reveal congressional intent for satellite carrier royalties. The language now in this subsection appears to have resulted from oversight, rather than from a conscious decision to permit royalty distribution to network program owners. The Satellite Home Viewer Act was first

contd.
page 2

introduced in the 99th Congress as H.R. 5126, and later incorporated into H.R. 5572. This bill created a compulsory license for satellite carriage of independent stations only. The original version of Section 119(b)(3) thus did not need to exclude network program owners from distribution because independent stations do not carry network programs.

When this bill was reintroduced in the 100th Congress as H.R. 2848, much of the language from the earlier bill was carried forward without change. The language of what is now Section 119(b)(3) remained unchanged. Likewise, the monthly royalty rate (now found in Section 119(b)(1)(B)) was 12 cents per subscriber for any station -- the same rate as found in the earlier bill. The scope of the compulsory license had been changed, however, to encompass network as well as independent station carriage. Thus, as originally introduced, H.R. 2848 would have required a monthly royalty fee of 12 cents per subscriber for both network and independent stations.

Congress changed the royalty rate for network stations in a manner that shows it did not intend royalties to be paid for network programs. The monthly rate for network stations was reduced to three cents per subscriber, while the monthly rate for independent stations remained at 12 cents per subscriber. In setting this rate differential, Congress stated that the fees "approximate the same royalty fees paid by cable households...and are modeled on those contained in the 1976 Copyright Act" for the cable compulsory license. H. Rep. No. 887 (II), 100th Cong. 2d Sess. 22 (1988).

In setting rates for Section 119, Congress used the same 1/4 rate for network stations as compared to independent stations found in the cable royalty rate plan because "the viewing of non-network programs on network stations is considered to approximate 25 percent" of the viewing of non-network programs on independent stations. The lower rate for network stations reflects the lower amount of non-network programs on those stations.

contd.
page 3

The rate differential in Section 119(b)(1)(B) reflects congressional intent that no royalties be paid for network programs, which make up the bulk of the programming on network stations. Because no royalties are paid for network programs, it follows that no royalties are available for distribution to network program owners. Yet, the CRT's ruling would allow distribution to network program owners in contravention of the structure of the congressional plan.

In its ruling, the CRT substituted its own rationale for that of Congress in determining that network program owners should be compensated. According to the CRT, "the disparity in rates can be attributed to the desire of Congress to establish the same payment level for satellite carriers as for cable, thereby avoiding unfair interindustry competition." 56 Fed. Reg. at 20,416. This purpose is not the one expressed by Congress (quoted above) as the reason why the rate differential was set. The CRT cannot, of course, substitute its own justification for that given by Congress.

The CRT also stated that the policy behind the cable rate disparity -- "that network programs have already been compensated" -- "does not apply for satellite carriers, because they are retransmitting network signals to 'white areas' only." Id. This rationale is completely at odds with the legislative history of Section 119, where Congress determined that network program owners should not be compensated for "white area" carriage of network programs:

The copyright owners of these non-network programs would be entitled to receive compensation for the retransmissions of the programs to "white areas."

> Owners of copyright in network programs would not be entitled to compensation for such retransmissions, since those copyright owners are compensated for national distribution by the networks when the programming is acquired.

contd.
page 4

H. Rep. No. 887 (II) at 23 (emphasis added); see also 134 Cong. Rec. H10472 (1988) (Rep. Markey) (same)1

In sum, the legislative history and structure of Section 119 do not support the CRT's decision to allow network program owners to claim for satellite carrier royalty distribution. MPAA would ask the Committee to review this matter and, if appropriate, to consider legislative revisions to ensure that the law is enforced in a manner consistent with Congress' original intentions.

Sincerely,

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1 Network representatives indicated that they were not seeking any compensation for "white area" carriage of network programs. Satellite Home Viewer Copyright Act: Hearings on H.R. 2848 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 1st and 2d. Sess. 213 (Mr. Rogers of NBC), 241 (Mr. Malarast of CBS) and 298 (Rep. Kastenmeier) (1989).

UNITED VIDEO®

Jeff Treeman
Senior Vice President
Chief Operating Officer

July 17, 1991

The Honorable William J. Hughes
Chairman
House Subcommittee on Intellectual
Property and Judicial Administration
207 Cannon House Office Building
Washington, DC 20515

Dear Chairman Hughes:

During my testimony to your Subcommittee during its July 10, 1991 oversight hearing on compulsory license, you asked me if United Video had an objection to a Home Satellite Viewer Act amendment which would allow home satellite distributors to be given standing to sue satellite carriers for failure to grant access or discriminatory pricing.

I replied that UVI had no objection and would welcome a close examination of our pricing and access record to distributors for the superstations we transmit by satellite.

The answer was an accurate reflection of UVI's position on access and pricing because our company has been a leader in making these services available to both the cable and home satellite dish (HSD) markets. But, because of peripheral issues lying very close to the question you raised and my concern that my answer might be quoted out of context, we feel some further comments are in order.

A. "NO OBJECTION" IS NOT SUPPORT FOR THE CONCEPT.

While we have no objections, we would not necessarily support such an amendment to the Home Satellite Viewer Act. As a concept we have no objections. However, if the final language of such an amendment goes beyond addressing the narrow issues and spills over into other peripheral issues which might affect us, we might have no choice but to oppose it.

3801 South Sheridan • Tulsa, OK • 74145 • (918)665-6690

B. **NO OBJECTION -- IF THE TERM "DISCRIMINATORY" IS REASONABLY DEFINED.**

One distributor has very forcefully argued repeatedly that the term "discriminatory" pricing means providing HSD service "at a rate different than the cable rate." If unlawful "discrimination" is based on such an untested and ill-conceived definition, I'm not so sure any current HSD pricing can receive a fair evaluation, since cable and HSD are very different markets and businesses in every way -- technically, financially and competitively.

We would urge that your Subcommittee address the definition of "unlawful discrimination" in any amendment granting HSD distributor standing. We are convinced that if you look into the differences between the cable and HSD markets in business, economics, and technology of providing superstation signals, they will not come out as "like services." Without such a definition (a standard against which pricing structures could be compared) of "discriminatory pricing," the door is open to frivolous exercise of legal standing by distributors with its accompanying costs to legitimate distributors and ultimately to consumers.

Moreover, the home satellite dish market is intensely competitive and, based on recent experience, we are very concerned that the threat of litigation under the Satellite Home Viewer Act could be inappropriately used by a distributor as a bargaining chip in negotiating. A possible solution to that problem would be to consider requiring an unsuccessful plaintiff in such an action to pay all costs and attorneys' fees.

* * *

Two final points.

First, among all the hundreds of HSD distributors, only one is pressing the case alleging discrimination in pricing. Why not others? The SBCA Retail Council, which

represents HSD dealers throughout the country, is opposed to legislation regulating the pricing of superstations. Why don't they -- who represent the broadest level of marketplace experience -- support such legislation?

Second, there are already procedures provided in the Communications Act of 1934 as amended and FCC regulations under which action can be taken to investigate and penalize unlawful discriminatory pricing. Currently, based on a complaint from one distributor, the FCC through its complaint proceedings is investigating allegations of unlawful pricing discrimination against UVI's sister company, Superstar Connection (named as United Video, Inc. in the complaint) and other satellite distributors. With two avenues open for bringing action against claimed discriminatory pricing, and one currently active, what useful purpose could be served by a third legislatively created avenue?

Chairman Hughes, we respectfully request that this letter be made part of the record for the oversight hearing on compulsory license. I believe this information to be important in providing a full picture of the issues examined by you and your Subcommittee during the proceedings.

Thank you.

Sincerely,

Jeff Treeman
Senior Vice President and
Chief Executive Officer

cc: Mr. Mike Remington
Mr. Gerry Weaver
Mr. Andy Paul

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